Supreme Court, U.S.
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(1)

No. ____

IN THE
Supreme Court of the United States

JAVITCH, BLOCK & RATHBONE, LLP,
Petitioner,

v.

SHERRY GIONIS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sections 807(5) and 807(10) of the Fair Debt Collection Practices Act (FDCPA) create a private right of action for damages against a debt collector for a threat to take an action that cannot legally be taken and for using any false representation or deceptive means of collecting a debt. Section 803(6)(A) of the FDCPA provides that the Act does not apply to creditors collecting their own debts. The Court found a literally true statement in a creditor's affidavit, attached to a pleading prepared and filed in state court by debt collection attorneys on a valid debt, threatened to seek attorney fees which could not be recovered under Ohio law, in violation of Sections 807(5) and 807(10) of the FDCPA. The questions presented are:

1. Whether the Petition Clause of the First Amendment affords qualified immunity or absolute privilege to such claims under Section 807(5) and 807(10) of the FDCPA.
2. Whether absolute witness immunity affords a defense to liability to such claims under Section 807(5) and 807(10) of the FDCPA.

PARTIES TO THE PROCEEDINGS & CORPORATE DISCLOSURE STATEMENT

Petitioner Javitch, Block & Rathbone, LLP was the defendant and the appellant below.

Respondent Sherry Gionis was the plaintiff and appellee below. (Respondent died on April 22, 2007 & there is currently no personal representative of the deceased).

Pursuant to Rule 29.6, there is no parent or publicly held company owning 10% or more of the corporation's stock, in Javitch, Block and Rathbone, LLP.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 2-18) is unreported (but is available at 238 Fed.Appx. 24, 2007 Westlaw 1654357). The order of the court of appeals denying rehearing and rehearing en banc is reprinted at Pet. App. 60-61 and is not otherwise published. The order of the court of appeals granting Petitioner's Petition for Permission to Appeal is reprinted at Pet. App. 57-59 and is not otherwise published. The order of the court of appeals denying Petitioner's motion to vacate and dismiss following notice and suggestion of Respondent's death is reprinted at Pet. App. 56 and is not otherwise published. The opinion of the District Court (Pet. App. 19-55) is reported at 405 F.Supp.2d 856.

JURISDICTION

The court of appeals entered its judgment on June 6, 2007. A timely petition for rehearing and rehearing en banc was denied on October 19, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT UNDER RULE 29.4(b)

Since the proceeding draws into question the constitutionality, as applied to pleadings, of Section 807 of the Fair Debt Collection Practices Act of 1977, Pub. L. 95-109, 91 Stat. 874 (1977) as amended by Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub.L. 104-208, Title II, § 2305(a), 110 Stat. 3009-425 (1996), codified as amended at 15 U.S.C. § 1692e, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. § 451 has in the course of these proceedings, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn into question.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the . . . right of the people . . . to petition the Government for a redress of grievances."

Section 807 of the Fair Debt Collection Practices Act (15 U.S.C. § 1692e) provides in pertinent part:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application

---

[1] The United States District Court for the Southern District of Ohio, Eastern and Western Divisions, have granted the United States permission to intervene, and the United States has intervened under 28 U.S.C. §2403(a) to defend the constitutionality of the Act as applied to pleadings in the following pending cases: Lee v. Javitch, Block & Rathbone, No. 1:06-cv- 585 (S.D. Ohio filed September 5, 2006); Miller v. Javitch, Block & Rathbone, No. 1:06-cv-828 (S.D. Ohio filed Dec. 12, 2006); Ison v. Javitch, Block & Rathbone, No. 1:04-cv-846 (S.D. Ohio filed Dec. 27, 2004); Delwader v. Platinum Fin. Servs. Corp., No. 1:04-cv-680 (S.D. Ohio filed Sept. 30, 2004); Rice v. Great Seneca Fin. Corp., No. 2:04-cv-951 (S.D. Ohio filed Sept. 1, 2004).

> of the foregoing, the following conduct is a violation of this section:
> * * *
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
> * * *
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

All references to the sections of "the FDCPA" or "the Act" are references to the *codified* sections of the Fair Debt Collection Practices Act, which are contained in Title 15 of the United States Code, Section 1692 *et seq*.

STATEMENT

A. The State Court Collection Litigation

On November 24, 2003, Petitioner Javitch, Block and Rathbone, LLP (JB&R) filed a civil suit on behalf of Direct Merchant's Credit Card Bank (DMCCB), against Respondent Sherry Gionis in the Belmont County Court, Belmont County, Ohio. The state court complaint filed by JB&R alleged:

> 1. There is due ... [DMCCB] from the Defendant [Ms. Gionis] upon an account, the sum of $2,040.98.
> * * *
> WHEREFORE, ... [DMCCB] prays for a Judgment against the Defendant in the amount of $2.040 .98 with interest at the rate

> of 10 .00% per annum from date of judgment, and costs of the within action.

Pet. App. 20. The state court complaint had the affidavit of DMCCB attached, which stated in pertinent part:

> * * *
>
> 4. . . . The agreement specifically provides that . . . [DMCCB] is entitled to recover, to the extent permitted by applicable law, its reasonable attorney's fees and costs incurred in any action to enforce its rights under the agreement.
>
> * * *

Pet. App. 20-21. The case was settled and dismissed and no attorney fees were sought, demanded or recovered in the state court. Pet. App. 21.

B. The District Court Litigation

On November 23, 2004, Respondent filed a putative class action complaint alleging that the reference in the DMCCB affidavit to the creditor's contractual right of recovery of attorney fees "to the extent permitted by applicable law", violated 15 U.S.C. §§ 1692e(2)(A), 1692e(2)(B), 1692e(5), 1692e(10), and 1692f(1). The district court's jurisdiction was invoked under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.

Petitioner stipulated that it was a debt collector within the meaning of the 15 U.S.C. § 1692a(6) of the FDCPA, and that under Ohio Revised Code § 1301.21, "creditors are not permitted to recover attorney fees incurred in connection with debt collection suits involving 'personal, family or

household" debt." Pet. App. 26-27, 28 n.2. In ruling on cross-motions for summary judgment, the district court found that the Petitioner violated 15 U.S.C. § 1692e(5) and § 1692e(10). Pet. App. 37-43. The court held that the "least sophisticated consumer" would construe the reference in the affidavit as a threat and would be confused, despite the absence of any evidence of consumer confusion in the record.

> "Defendant's conduct could "unlawfully scare" the consumer by making her believe that, if she did not immediately pay her credit card bill, she could be held liable for substantial attorney fees in addition to the relief sought in the complaint."

Pet. App. 43.

The district Court summarily rejected the Petitioner's claims of immunity under the Petition clause of the First Amendment and under the doctrine of absolute witness immunity. Pet. App. 30-31.

On December 3, 2005, Petitioner sought certification of the order under 28 U.S.C. § 1292(b). On December 6, 2005, Petitioner filed a notice of appeal under the collateral order doctrine from the denial of Petitioner's claim of absolute immunity. On December 15, 2005, the district court certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Pet. App. 46-55.

On February 8, 2006, the Court of Appeals for the Sixth Circuit granted permission to appeal. Pet. App. 57-59. The two appeals were consolidated. *Id.*

C. The Court of Appeals Decision

On June 6, 2007, the Court of Appeals affirmed on the merits, with one Judge dissenting. Pet. App. 2-18. The majority of the Court observed:

> In a strict sense, neither § 1692e(5) nor § 1692e(10) has been violated here. The Affidavit only says Direct Merchant "is entitled to recover, *to the extent permitted by applicable law,* its reasonable attorney's fees and costs incurred in any action to enforce its rights under the agreement."(JA 20) (emphasis added). Because the credit card agreement (though not the Affidavit) defines "applicable law" as "federal law, and laws of Arizona," and because the case was filed in Ohio, there was (technically speaking) no "threat to take any action that cannot *legally* be taken," § 1692e(5) (emphasis added), nor "use of any *false* representation or *deceptive* means to collect" Gionis's debt, § 1692e(10) (emphases added).

Pet. App. 8. Viewing the language through the hypothetical lens of the least sophisticated consumer, however, the court found that the affidavit could be construed as an ongoing threat to seek attorney fees, even though no demand for attorney fees was contained in the Complaint's prayer for relief:

> Javitch's failure to assert the attorney fees language in the complaint's "prayer of relief" section does not cure the threat. . . . The least sophisticated consumer would not realize what a trained lawyer would-that a failure to assert a request for attorney fees in a complaint's

> "prayer of relief" generally bars recovery of such relief. *See* Ohio Civ. P.R. 8(A). Hence, either way we slice it, an unlawful "threat" to collect attorney fees was made in the Affidavit, violating § 1692e(5), which also amounted to a "false representation or deceptive means to collect or attempt to collect a[ ] debt[,]" violating § 1692e(10).

Pet. App. 8-11. Judge Steeh, dissenting, observed that "even if appellant could not lawfully seek attorney's fees in Ohio, there is no threat to do so stated or implied in the complaint or affidavit." Pet. App. 13-18.

The Court rejected Petitioner's claims of immunity under the Petition clause of the First Amendment, because it found that recognizing qualified immunity or absolute privilege here would "undercut *Heintz v. Jenkins*-where the Supreme Court held that "the Act applies to attorneys who 'regularly' engage in consumer-debt-collection activity, even when that activity consists of litigation." Pet. App. 5-6 (quoting *Heintz*, 514 U.S. at 299).

As to absolute witness immunity, the Court held that witness immunity did not extend to attorneys who "merely attached the Affidavit to the state court complaint" and that witness immunity was not available to Petitioner because it "set the wheels of government in motion by instigating a legal action." Pet. App. 6-7 (quoting *Todd v. Weltman*, 434 F.3d 432, 439 (6th Cir.2006) (quoting *Wyatt v. Cole*, 504 U.S. 158, 164-65 (1992))).

Petitioner timely sought rehearing and suggested rehearing en banc on June 18, 2007, which the Sixth Circuit denied on October 19, 2007. Pet. App. 60-61. On October 22, 2007, Petitioner learned that Respondent died on April 22, 2007. On October 23, 2007, before the mandate issued, Petitioner filed a notice and suggestion of death in the court of appeals, advising the Court that Respondent died on April 22, 2007, that there was no personal representative of the deceased, and served a copy on the Respondent's heir, Kathie Gionis, nka King. Petitioner moved to stay the issuance of the mandate and to direct further proceedings, and further moved to vacate the panel decision and dismiss the action as moot. The Sixth Circuit denied the motions on November 19, 2007. Pet. App. 56.

REASONS FOR GRANTING THE PETITION

This case raises important, recurring and disturbing questions relating to the scope of the Fair Debt Collection Practices Act, the meaning of this Court's decision in *Heintz v. Jenkins*, 514 U.S. 291 (1995), the First Amendment Right to Petition courts for the redress of grievances and the common law privileges and immunities afforded to participants in the judicial process.

There is no question that a pleading seeking to adjudicate a consumer debt filed in state court is a petition within the meaning of the First Amendment Petition clause. As such, unless the pleading was objectively baseless, lacked probable cause, or was a sham, it was not actionable at all. In *Heintz*, this Court interpreted Section 1692a(6) of the FDCPA to apply to lawyers even when the activities engaged in

consisted of litigation, finding no implied exception for litigation contained within the text of the Act. *Heintz*, 514 U.S. at 299. *Heintz* did not hold that all litigation engaged in by debt collection lawyers was regulated by 15 U.S.C. § 1692e, nor does the decision foreclose the important constitutional question raised here. The Sixth Circuit decision below is in direct conflict with this Court's First Amendment Right to Petition cases, holding liability cannot attach for filing a judicial petition unless the petition was both objectively baseless and motivated by an improper purpose. Review should also be grated to address whether the First Amendment Right to Petition embodies the common law absolute privilege afforded to participants in the judicial process for pertinent statements made in the course of a judicial proceeding. The decision should be reversed because it undermines core values protected by the First Amendment Right to Petition, burdening resort to the judicial process for redress of grievances with intolerable self-censorship.

The decision is also in direct conflict with this Court's First Amendment speech cases, which inform petition clause jurisprudence. Under the First Amendment speech clause, literally true expressions retain constitutional protection when the expression concerns lawful activity and is not inherently misleading. A lawsuit to adjudicate a debt, although undoubtedly unwelcome by any consumer, is not an evil in itself which Congress could ban under the FDCPA and remains a lawful activity. Further, the only statutory defense available to claims under the FDCPA, the bona fide error defense under 15 U.S.C. § 1692k(c), does not contain a heightened showing of intent or a malice requirement and has been limited

in its application to clerical errors by many courts. As such, imposing strict liability for pleadings under the FDCPA is fundamentally incompatible with the First Amendment.

The decision is also in direct conflict with this Court's use of the canon of avoidance as reflected in the *Noerr-Pennington* doctrine. If the Court determines that the FDCPA does apply to pleadings, it will necessarily involve a serious constitutional question that must be answered, because such a construction leads to strict liability for engaging in petitioning activity.

The decision is also in direct conflict with this Court's witness immunity decisions which distinguish between the functions performed as an advocate and a witness, both of whom are integral participants in the judicial process, and both of whom enjoyed varying degrees of immunity at common law.

The decision also adds confusion to a conflict among the Circuits on the application of the FDCPA to debt collection litigation. Although the Sixth Circuit previously held that the FDCPA did not abrogate common law immunities, the Fourth Circuit recently held it did, and the Seventh Circuit reserved the question, expressing serious doubt over whether the Act applied to pleadings filed in state courts.

In sum, the decision represents an unheralded decent down the slippery slope of promoting consumer protection under the FDCPA at the expense of the petitioning for the redress of grievances, and points to the need to re-evaluate *Heintz v. Jenkins*. The Act does not expressly

demarcate the differences between the functions traditionally performed by lawyers in their capacity as lawyers and the functions performed by debt collection lawyers, creating uncertainty as to the scope of the Act. The "logic" of *Heintz v. Jenkins*, that "the Act applies to attorneys who 'regularly' engage in consumer-debt-collection activity, *even when that activity consists of litigation[,]*" has led to a proliferation of litigation against lawyers engaged in consumer litigation. *Heintz v. Jenkins*, 514 U.S. 291, 299 (1995) (emphasis added). To date, *Heintz v. Jenkins* is the only decision by this Court interpreting the Act and it expressly left the task of "authoritatively interpret[ing] the Act's conduct-regulating provisions" to another day. *Id.* at. 296. Petitioner believes that day has come.

If allowed to stand, the decision will erode fundamental principles of liberty and justice which lie at the base of all civil and political institutions in our form of government. If left undisturbed, the decision will have the practical effect of making lawyers engaged in consumer collection litigation strictly liable for valid claims filed on behalf of their clients, due to a mere potential risk of consumer confusion.

I. Review is required because the decision conflicts with relevant decisions of this Court interpreting the First Amendment Right to Petition.

The First Amendment Right to Petition is implicated when claims under federal law are premised on the content of pleadings, because the

express language of the First Amendment limits Congressional authority to "abridge" the Right to Petition for redress: "Congress shall make no law . . . abridging the . . . right of the people. . . to petition the Government for a redress of grievances." U.S. Const. 1st Am. "The right to petition is cut from the same cloth as the other guarantees of . . . [the First] Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). Filing a complaint in court is a form of petitioning activity protected under the First Amendment's Right to Petition. *Id.* Further, there is no exception to the Right to Petition that would support a different analysis dependent on the type of petition at issue or on who filed the petition. *Foraker v. Chaffinch,* 501 F.3d 231, 237 (3d Cir. 2007) ("Whereas the Free Speech Clause protects the right to "wide-open" debate, the Petition Clause encompasses only activity directed to a government audience. This distinction correlates to the separate analysis for each clause."); see also *Van Deelen v. Johnson*, 97 F.3d 1151, 1156 (10th Cir. 2007)("the petitioning clause of the First Amendment does not pick and choose its causes. The minor and questionable, along with the mighty and consequential, are all embraced."); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1186 (9th Cir. 2005)("The First Amendment petition right belongs to the defendants in the original case, though their employees, law firms and lawyers, as their agents in that litigation, get to benefit as well."); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931-33 (9th Cir. 2006); *In re Airport Car Rental Antitrust Litigation*, 521 F.Supp. 568 (N.D.Cal. 1981), aff'd. 693 F.2d 84, (9th Cir. 1982), cert. denied 462 U.S. 1133 (1983).

Under the Right to Petition, this Court has held qualified immunity exists unless there is a showing that a prior suit was both objectively baseless and subjectively motivated by an unlawful purpose. *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532 (2002); *McDonald v Smith*, 472 U.S. 479, 484.

A federal statute that imposes strict liability for any potentially confusing statement contained in a petition invoking a court's jurisdiction, would violate or unduly chill the First Amendment Right to Petition. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983); *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 532; *Peel v. Attornèy Reg. & Disciplinary Comm. Of Ill.*, 496 U.S. 91, 111 (1990).

There was no dispute that the state court action was supported by probable cause and it was not objectively baseless and the statements at issue were literally true. Pet. App. 20-21, 26. Applying the Court's Right to Petition precedents here should have led the courts below to enter judgment in favor of Petitioner, warranting reversal. *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 62-63 (1993).

a. Review is required to determine whether the First Amendment Right to Petition affords private attorneys who participate in the judicial process with qualified immunity or absolute privilege for pertinent statements made in the course of judicial proceedings.

At common law, lawyers and parties seeking redress in a judicial proceeding possessed an absolute privilege concerning statements which are reasonably related to and made in the course of judicial proceedings, and were absolutely immune from suit for tort claims which are based on such statements. *Buckley v. Fitzsimmons*, 509 U.S. 259, 277 (1993); *Burns v. Reed*, 500 U.S. 478, 490 (1991) (quoting *King v. Skinner*, Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772)); *Stump v. Sparkman*, 435 U.S. 349 (1978).

While *McDonald* held that no absolute privilege existed under the Petition Clause, the petition at issue in *McDonald* did not involve a petition submitted to a court of law, nor involve a statement made in the course of a judicial proceeding. There is a compelling argument that either *McDonald* was limited by its facts, or that as to the content of judicial petitions, absolute privilege applies. *J & J Const. Co. v. Bricklayers and Allied Craftsmen, Local 1,* 468 Mich. 722, 735-55, 664 N.W.2d 728, 735-45 (2003) (Young, J., concurring); *Briscoe v. LaHue*, 460 U.S. 325, 332, n. 12 (1983); J. M. Spanbauer, *The First Amendment Right To Petition Government For A Redress Of Grievances: Cut From A Different Cloth,* 1 Hastings Const. L.Q. 15, 22-25, 52-57 (1993); C. Andrews, *A Right Of Access To Court Under The Petition Clause Of The First Amendment: Defining The Right*, 60 Ohio St. L.J. 557, 581 (1999).

Interpreting the Constitution, the primary objective is to discern the original intent of the constitutional text. See, e.g., *Utah v. Evans,* 536 U.S. 452, 491 (2002) (Thomas, J., concurring in part and

dissenting in part, joined by Kennedy, J.); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 359 (1995). The Bill of Rights preserved common law rights as they existed in 1791. *McIntyre,* 514 U.S. 334, 371-372 (Scalia, J., dissenting, joined by Rehnquist, C.J.); *Curtis v. Loether*, 415 U.S. 189, 193 (1974).

The Petition Clause of the First Amendment affords protection for seeking redress sought from all branches of the state and federal government, legislative, executive and judicial. C. Andrews, *A Right Of Access To Court Under The Petition Clause Of The First Amendment: Defining The Right*, 60 Ohio St. L.J. 557, 611-21. It stands to reason that where the common law afforded an absolute privilege for seeking redress to a particular branch of government, the framers of the First Amendment must have intended the corresponding Right to Petition be preserved as it existed at common law.

English common law afforded private counsel with an absolute privilege for statements made in judicial pleadings, as enunciated by Lord Mansfield 1772: "Neither party, witness, counsel, jury, or Judge can be put to answer, civilly or criminally, for words spoken in office." *King v. Skinner*, 98 Eng. Rep. 529 (K.B.1772). In contrast, where the claim centered on the propriety of commencing the action, common law did not recognize absolute privilege as a bar to malicious prosecution or abuse of process. See e.g., *Vausse v. Lee*, 1 Hill (SC) 197, 19 S.C.L. 197 (S.C.App. 1833); Restatement (Second) of Torts §§ 674, 675, 682 (1977). The privilege was part of the "cluster of immunities protecting the various participants in judge-supervised trials," which

stemmed "from the characteristics of the judicial process." *Butz v. Economou*, 438 U.S. 478, 512 (1978).

Early libel and slander cases in state courts provide clear evidence that the privilege as it existed at the time the First Amendment was adopted, afforded participants in the judicial process with an absolute privilege for statements made in the course of judicial proceedings. *Mayrant v Richardson*, 1 Nott & McC. 347, 10 S.C.L. 347 (S.C. 1818); *Hardin v. Cumstock*, 2 A.K.Marsh. 480, 9 Ky. 480 (Ky. App. 1820); *Hoar v. Wood*, 3 Met. 193, 197-198, 44 Mass. 193 (1841); *Swearingen v. Birch*, 4 Yeats 322 (Pa. 1806); *Harris v Huntington*, 4 Am.Dec. 728, 2 Tyl. 129 (Vt. 1802); *Milam v. Burnsides*,1 Brev. 295, 3 S.C.L. 295 (S.C. Const. App. 1803); *Thorn v. Blanchard*, 5 Johns 508, Lock. Rev. Cas. 313 (N.Y. 1809); *Kean v. M'Laughlin*, 2 Serg. & Rawle 469 (Pa. 1816).

In commenting on the privilege in 1991, six years after *McDonald* was decided, this Court observed:

> Like witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses.

Burns v. Reed, 500 U.S. 478, 489-490 (1991). There is no rational doctrinal basis for diminishing the absolute privilege under the First Amendment

Petition Clause for statements fitting this description.

This case provides the Court with an opportunity to squarely address and settle the question of whether the First Amendment Right to Petition affords participants in the judicial process with absolute privilege for pertinent statements made in judicial proceedings.

II. Review is required because the decision conflicts with relevant decisions of this Court interpreting the First Amendment Right of Free Speech.

Although *McDonald* held the Right to Petition should be accorded no greater protection than the rights to free speech and free press, *McDonald, supra* at 485, it is well-settled that the First Amendment speech clause affords some breathing room and does not permit the imposition of strict liability as contemplated by the FDCPA for true statements. *New York Times v Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

Statements, whether true or false, are protected for their own value under the First Amendment Speech Clause; and, false statements invoke protections, heightened standards of proof and proof of malicious intent, because a core value of the First Amendment seeks to protect speech that matters, which might be collaterally "chilled" without such protections – the so called "breathing room" approach. See, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493-97 (1995) (Stevens, J., concurring); *Dun*

& Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757 (1985); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 n. 26 (1976).

The breathing room concept recognized in First Amendment speech cases extends to protect the right to prosecute a suit unless it lacks a "reasonable basis" in law or fact. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U .S. 731, 743. Were the Court to permit the FDCPA to result in liability based on the content of pleadings that are not objectively baseless, it would lead to strict liability for what is protected petitioning activity, and "intolerable self-censorship." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339.

The decision does not even meet the well-recognized protections afforded to commercial speech under the First Amendment. Even if the pleading were evaluated as commercial speech, which enjoys lesser protection under the First Amendment, commercial expressions retain constitutional protection when the expression concerns lawful activity and is not inherently misleading. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993); *Peel v. Attorney Disciplinary Comm'n of Ill.*, 496 U.S. 91, 111 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Commercial speech that is merely "potentially misleading" is still entitled to First Amendment protection. *Peel, supra; In re R.M.J.*, 455 U.S. 191, 203 (1982).

The dissent recognized the statement in the affidavit at issue was true, and in the absence of any evidence of confusion or being misled, the majority

affirmed on the grounds that the affidavit had the potential to confuse or mislead the least sophisticated consumer who "might feel pressured to immediately pay the debt . . . ." Pet. App. 13-14. A lawsuit to adjudicate a debt, although undoubtedly unwelcome by any consumer, is not an evil in itself which Congress could ban under the FDCPA and remains a lawful activity deserving of constitutional protection under the First Amendment. See *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222-224 (1967).

III. Review is required because the decision conflicts with relevant decisions of this Court applying the canon of avoidance under the *Noerr-Pennington* doctrine.

The plain meaning canon of statutory construction yields when the application of an Act of Congress implicates interests protected by the First Amendment. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 740-41; see also *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). The *Noerr-Pennington* doctrine has been interpreted as a specific application of the canon of avoidance applicable to all federal statutory causes of action that implicate the Right to Petition. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931-33; see *Clark v. Martinez*, 543 U.S. 371, 380 (2005). See also *New York v. U.S.*, 505 U.S. 144, 156 (1992) ("under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.").

As a rule of statutory construction, the *Noerr-Pennington* doctrine and the canon of avoidance support a restricted reading of the FDCPA. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 740-41; *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931-33. Filing a complaint seeking a state court adjudication of the amount owed on a debt, "stands apart" from other forms of conduct regulated by the FDCPA, and "runs headlong" into core values protected by the First Amendment, warranting a departure from a literal application of the Fair Debt Collection Practices Act. *Bill Johnson's, supra.*

Applying the strict liability standards of the FDCPA to "debt collection" pleadings chills advocacy, undermines access to courts, disserves the Right to Petition, making lawyers insurers against confusion, with no discernable standard as to how to avoid liability and lead to the absurd results this Court thought lower courts were unlikely to endorse. *Heintz,* 514 U.S. 291, 296-97.

IV. Review is required because the decision misinterprets the holding of *Heintz v. Jenkins.*

The holding in *Heintz v Jenkins* involved a narrow analysis of the statutory text of 15 U.S.C 1692a(6), in order to determine whether the Act's definition of a debt collector contained an implied exception for attorneys engaged in litigation. *Heintz v. Jenkins*, 514 U.S. 291 (1995). The Court's holding acknowledged the narrow scope of the issue before the Court. *Heintz v. Jenkins*, 514 U.S. 291, 292. *Heintz* cannot be understood as foreclosing *sub*

silentio issues which were never raised, argued, or decided by this Court, even if the issues were lurking in the record. *U.S. v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *Webster v. Fall*, 266 U.S. 507, 511 (1925). *Heintz v. Jenkins'* holding that Congress did not "silently and implicitly" create broad exceptions for lawyers engaged in litigation when the FDCPA was enacted, cannot be taken to mean, as the Sixth Circuit construed *Heintz*, that Congress "silently and implicitly" abrogated the First Amendment Right to Petition when it drafted and amended § 1692e of the FDCPA. Pet. App. 5-6 (construing *Heintz v. Jenkins*, 514 U.S. at 299). Because the Federal Trade Commission lacks regulatory and interpretive authority to elaborate on the vague and ambiguous terms of the FDCPA, the bulwark of interpreting the Act has been left to the Courts. 15 U.S.C. § 1692l(d).

Heintz rested its holding on the plain language of the statute and a 1986 amendment eliminating the attorney exemption originally part of the Act. *Heintz*, 514 U.S. 291, 294-95. *Heintz* found no Congressional intent to differentiate between debt collection and litigation in the legislative history of the FDCPA that would support an implied exception for litigation under § 1692a(6). *Heintz*, 514 U.S. at 294-95, 297-98. *Heintz* did not purport to interpret all conduct regulating provisions of the Act, and the result here was not considered among the possible absurd or anomalous results. *Id.* at 295-97. Because the legislative history of the Act does not support applying 15 U.S.C. § 1692e(5) and (10) to pleadings, and because state court pleadings implicates the First Amendment Right to Petition, discussed *supra*,

reconsideration of *Heintz* and a limiting construction of the Act are warranted.

The conduct Congress sought to regulate under the FDCPA when enacted in 1977, included abusive practices directed to consumers and third parties that occurred *outside* the context of litigation – late night telephone calls, threats of harm, harassing letters, disclosures of embarrassing debt information to employers, neighbors and family. S. Rep. No. 95-382 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696. The Act prohibited debt collectors from simulating legal process or representing that legal process was not legal process; from falsely claiming that documents were authorized, issued or approved by any court; falsely claiming to be an attorney; implying that non-payment would result in loss of a claim or defense, or threatening non-judicial action to deprive the consumer of property. 15 U.S.C. §§ 1692e(13), 1692e(15), 1692e(9), 1692e(3), 1692e(6)(A), 1692f(6). It further prohibited debt collectors from forum abuse thereby depriving the consumer of his day in court. 15 U.S.C. § 1692i. S. Rep. 95-382, 1977 U.S.C.C.A.N. 1695, 1699. See also H.R. Rep. No. 95-131, p. 6 (1977). The FDCPA contained several other references to Court processes, but none of these provisions expressly refer to pleadings filed in the course of litigation. See 15 U.S.C. § 1692a(6)(D); § 1692c (a) & (b).

The 1986 amendment to the Act was prompted by concerns that non-litigating attorneys were unfairly competing with lay debt collectors. H.R. Rep. No 99-405 (1986) reprinted in 1986 U.S.C.C.A.N. 1752. The intent of the 1986 amendment was to

remedy the problem of attorneys entering "the debt collection business", to eliminate the "[d]istinctions between attorney debt collectors and lay debt collectors", and to apply existing regulation under the FDCPA applicable to lay debt collectors to "attorney debt collectors." H.R. Rep. No 99-405 (1986) reprinted in 1986 U.S.C.C.A.N. 1752, 1752-54. See *Dutton v. Wolpoff & Abramson,* 5 F.3d 649, 655 (3d Cir.1993). When introduced on the floor of the House, the same reasons were cited in support of the Amendment, and the Bill was characterized as "a fairness bill. It makes certain that all debt collectors operate under the same set of rules, a set of rules which debt collectors themselves have testified are easy to follow and do not restrict the business of ethical debt collectors." 131 Cong.Rec. H10534-02 (Remarks of Rep. Annunzio) (12-2-85). The abusive collection practices that were unregulated before enactment of the FDCPA which the amendment addressed, irrespective of whether the actor held a law degree, included:

> [L]ate night telephone calls to consumers, calls to consumers' employers concerning the consumers' debts, frequent and repeated calls to consumers, disclosure of consumers' debt to third parties, threats of legal action on small debts where there is little likelihood that legal action will be taken, simulation of legal process, harassment, abuse, threats of seizure, and attachment and sale of property where there is little likelihood that such action will be taken.

Id. at 1755. If litigation was understood by Congress in 1986 as the equivalent of debt collection, as

suggested by *Heintz*, then attorneys were not *becoming* debt collectors for the first time in 1986 – they were *always* debt collectors. *Heintz*, 514 U.S. at 294. In this respect, even if pleadings could be construed to fit within the plain language of the Act, they cannot be regulated by the Act because doing so is "not within its spirit nor within the intention of its makers.'" *Muniz v. Hoffman*, 422 U.S. 454, 469 (1975) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)).

Most of the conduct-regulating provisions of the Act are phrased in the negative, prohibiting debt collectors from engaging in "abusive" conduct. The only two affirmative disclosure requirements in the Act appeared in § 1692e(11) and § 1692g. An amendment was made in 1996 to § 1692e(11) to exempt pleadings from the subsequent disclosure requirements under that section. Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub.L. 104-208, Title II, § 2305(a), 110 Stat. 3009-425 (1996). The 1996 amendment followed shortly after this Court's decision in *Heintz v. Jenkins* in 1995. Although there is no legislative history explaining the intent behind the amendment, its effect was to curtail the only affirmative disclosure requirement under the Act relating to "subsequent communications" that could have applied to litigation. Between the date *Heintz* was decided and the effective date of the Amendment, one commentator observed:

> Although not addressed in case law, the notice provisions of the section [§ 1692e(11)] are, arguably, applicable to the summons, complaint and other pleadings in a collection

> action. Having found the Act applicable to attorneys in litigation, *Heintz* provides no clear guidance to the extent of its application. Therefore, the only safe course is to print the required warning on all pleadings filed in any consumer collection action.

Robert A. Monteith, *Collecting Debt In Wyoming: The Fair Debt Collection Practices Act As A Trap For The Unwary*, 31 Land & Water L. Rev. 731, 741 (1996)(footnotes omitted). As the amendment followed shortly after this Court's decision in *Heintz v. Jenkins*, the 1996 Amendment can be understood as reflecting Congressional intent to avoid application of the Act to state court litigation resulting from the Court's interpretation of the Act.

Whether the initial disclosure required by 15 U.S.C. § 1692g was intended to apply to pleadings was a question that divided the Circuits, with the Seventh and Second Circuits holding that pleadings were, and the Eleventh Circuit holding pleadings were not, initial communications within the meaning of that section. *Goldman v. Cohen*, 445 F.3d 152, 157 (2d Cir. 2006); *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914 (7th Cir. 2004); *Vega v. McKay*, 351 F.3d 1334, 1337 (11th Cir. 2003). The conflict was resolved when Congress amended the Act in 2006 to expressly provide that pleadings were not communications under § 1692g. Financial Services Regulatory Relief Act of 2006, Pub.L. 109-351, Title VIII, § 802, 120 Stat. 2006 (2006)(amending 15 U.S.C. §1692g(d)(2006)). See *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470 (7th Cir. 2007). The Amendment was intended to make clear that "a formal pleading in any

civil action will not be considered communications now as defined by the FDCPA." 152 Cong. Rec. H7573-01, H7588 (Remarks of Rep. Garrett)(9-27-06) (consideration of Financial Services Regulatory Relief Act of 2006, PL 109-351, 120 Stat. 1966, §802, effective 10-13-06). In light of the 2006 amendment, "it is far from clear that the FDCPA controls the contents of pleadings filed in state court." *Beler*, 480 F.3d 470, 473.

Additional evidence that Congress did not intend debt collection pleadings to be assessed under the FDCPA at all appears in the legislative history of the Federal Debt Collection Act, 31 U.S.C. § 3718. In 1983, Congress authorized agencies of the federal government to contract with private debt collectors to pursue collection of debts owed to the government. See Debt Collection Act of 1982, Pub.L. 97-452, § 1(16)(A), 96 Stat. 2473 (1983) (codified as amended at 31 U.S.C. § 3718 (2004)). When originally enacted, debt collectors acting on behalf of the United States were not authorized to undertake any legal action on behalf of the agency to collect those debts – authority to litigate was reserved to the federal agency. S. Rep. No. 97-378 (1982), reprinted in 1982 U.S.C.C.A.N. 3377, 3395 ("Authority to resolve disputes, compromise claims, terminate collection action, and to *litigate* will be retained by the federal agency and *remain solely a federal responsibility*.") (emphasis added). Because private collection agencies could not litigate or even threaten to litigate, Congress amended the Act in 1986 to authorize agencies to contract with private law firms to not only collect debts, but to initiate litigation on behalf of the United States. Debt Collection Amendments of 1986, Pub .L. 99-578, § 1, 100 Stat. 3305 (1986); H.R. Rep.

No. 99-909 (1986), reprinted in 1986 U.S.C.C.A.N. 5605, 5606-07:

> Experience has shown that many debtors will not pay their debts unless threatened with litigation, and that some will not pay unless they are actually sued. However, because of the lack of resources in the Department of Justice to litigate these cases, debtors know that failure to pay on the debts will probably go unaddressed, and that ultimately the applicable statute of limitations will forever bar recovery of their debts. . . .
>
> In order to make the threat of litigation for non-payment of debts to the Government a real one, and thus to provide adequate incentives to pay these debts, the Attorney General would be authorized under H.R. 5541 to enter into contracts with private attorneys for the performance of legal services for the United States for the collection of these debts. This grant of authority should not only lead to more debts being paid as a result of litigation, but should also lead to the earlier payment of debts because of the threat of litigation.
>
> * * *

As amended, the Federal Debt Collection Act provides that "private counsel performing [such] legal services", are debt collectors under the FDCPA. 31 U.S.C. § 3718(b)(6). Claims of the United States brought under this statute are governed by the Federal Debt Collection Procedures Act, 28 U.S.C. §§ 3001-3308, and 28 U.S.C. § 3003(f) makes the Federal Rules of Civil Procedure applicable to such claims. Thus, pleadings relating to debts owed the

government filed by attorneys (who are debt collectors) on behalf of the United States are measured under the standards of Rule 11, not 15 U.S.C. § 1692e(5) and (10). See also 28 U.S.C. § 2072 (Rules Enabling Act); 4 Wright & Miller, Federal Practice & Procedure Civ. 3d § 1001 (2002).

In like fashion, state rules of Civil Procedure, including Rule 11, regulate pleading a cause of action in state court. Litigation practices and state rules of civil procedure are traditional matters of state concern. *American Bar Ass'n v. F.T.C.*, 430 F.3d 457, 472 (D.C. Cir. 2005)("The states have regulated the practice of law throughout the history of the country; the federal government has not."). Nothing appears in either the original legislative history or the 1986 amendment to the FDCPA, supporting the view that Congress intended the FDCPA to regulate the content of state court pleadings or state court litigation and to preempt Rule 11 as the governing standard applicable to pleadings filed under the FDCPA.

Against this legislative background of curative amendments, legislation on the same subject evidencing an intent that the Act was not intended to apply to litigation, and the absence of any discussion of state court litigation in the legislative history, it appears that the *only* view that litigation by attorneys was intended to be regulated under the FDCPA appears in *Heintz v. Jenkins* dicta.

If on the other hand, *Heintz v. Jenkins* was intended to be read as expansively as the Sixth Circuit has here, only this Court has the authority to settle the question. The result here points to a dire

need to revisit *Heintz*. The effect of the FDCPA over state rules of civil procedure is a matter that will affect the administration of justice in each of the 50 states. Creditors throughout the Nation who resort to state courts seeking adjudication of the debts owed them by consumers and their attorneys should be informed by this Court that Rule 11 standards have been preempted by the FDCPA, and the new governing strict liability standard is the potential for consumer confusion.

The time is ripe for the Court to clarify that *Heintz* did not establish the caustic proposition that strict liability is constitutionally permitted under the FDCPA whenever a pleading has the potential of being misread by a hypothetical consumer.

V. Review is required to resolve a conflict in the circuits on whether the FDCPA abrogated common law witness immunity and to correct a clear error concluding Petitioner was functioning as a complaining witness, not entitled to common law witness immunity.

Attorneys offering witness testimony in judicial proceedings, even if the testimony proved false, were afforded with absolute immunity from suit under the doctrine of witness immunity. *Burns v. Reed* supra; *Briscoe v. LaHue*, 460 U.S. 325, 330-334. The immunity was grounded in the view that witnesses must be free from fear of suit for what they say in court, which outweighs the need to afford a remedy for personal injury. *Briscoe*, 460 U.S. at 330-334.

In *Todd v. Weltman, Weinberg & Reis Co., L.P.A.*, 434 F.3d. 432, 439 (6th Cir. 2006), the Sixth Circuit held that absolute witness immunity was not abrogated when the FDCPA was enacted. The Sixth Circuit decision in *Todd* follows the canon of statutory construction that a well-recognized immunity at common law should be applied to a federal statutory cause of action unless Congressional intent to abrogate appears manifest, or a statutory purpose to the contrary is evident. *U.S. v. Texas*, 507 U.S. 529, 534 (1993). Finding no intent to abrogate absolute witness immunity, the Sixth Circuit held absolute witness immunity applied to claims brought under the FDCPA. *Todd,* 434 F.3d. 432, 439. The Sixth Circuit utilized a functional analysis to determine whether FDCPA defendant claiming absolute immunity was entitled to do so at common law:

> The fact that Plaintiff is suing under the FDCPA and not the common law claim does not affect the immunity status of Defendant. . . . . The Court reserves absolute immunity for individuals when they functionally serve as "integral parts of the judicial process," such as judges, advocates, and witnesses in their ordinary judicial roles.

Todd, 434 F.3d at 447 (quoting *Briscoe*, 460 U.S. at 335).

Here, the panel found Appellant was not acting as a witness, made no determination whether the function performed in filing the complaint was that of an advocate, but held Petitioner was not entitled to witness immunity because the affidavit

was attached to a state court complaint, and thus "set the wheels of government in motion by instigating a legal action." Pet. App. 6 (quoting *Todd v. Weltman,* 434 F.3d 432, 444, quoting *Wyatt v. Cole,* 504 U.S. 158, 164-65 (1992)). That conclusion is patently wrong.

Absolute witness immunity is available to attorneys whether or not they are debt collectors when they functionally serve as advocates. If filing a complaint on behalf of a client is not the quintessential function of an advocate, nothing a private attorney does would ever qualify. *Kalina v. Fletcher* held the "critical question" which distinguishes between and advocate and a witness turns on whether the advocate was '[t]estifying about facts [which] is the function of the witness, not of the lawyer . . . ." *Kalina v. Fletcher*, 522 U.S. 118, 130-131 (1997). As to the preparation and filing of pleadings, *Kalina* held this to be a function of the advocate:

> Petitioner's activities in connection with the preparation and filing of two of the three charging documents-the information and the motion for an arrest warrant-are protected by absolute immunity. Indeed, except for her act in personally attesting to the truth of the averments in the certification, it seems equally clear that the preparation and filing of the third document in the package was part of the advocate's function as well. The critical question, however, is whether she was acting as a complaining witness rather than a lawyer when she executed the certification "[u]nder penalty of perjury."

Kalina v. Fletcher, 522 U.S. 118, 129.

If witness immunity were not extended to protect the lawyer offering the testimony of witnesses, no attorney would be willing to offer sworn testimony to court without first securing a right of indemnity against the witness in case of a subsequent suit challenging the truth of the testimony. That type of self-interest is antithetical to the lawyer-client relationship and the duty to zealously represent the interests of a client.

> [I]f the risk of having to defend a civil damage suit is added to the deterrent against such conduct already provided by criminal laws against perjury and subornation of perjury, the risk of self-censorship becomes too great. This is particularly so because it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present. . . .."

Imbler v. Pachtman, 424 U.S. 409, 439-440 (1976) (White, J. concurring).

In contrast to *Todd*, the Fourth Circuit recently held common law immunities were abrogated when the FDCPA was enacted, principally because this Court held in *Heintz v. Jenkins* that "the FDCPA "applies to the litigating activities of lawyers." *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 231-232 (4th Cir. 2007)(quoting *Heintz*, at 294). The Fourth Circuit observed that the majority of Circuits have "recognized the general principle that the FDCPA applies to the litigation activities of

attorneys who qualify as debt collectors under the statutory definition." *Id.* at 232. None of the Circuit decisions cited by the *Sayyed* court have considered the First Amendment implications of applying a strict liability standard to pleadings, which counsels strongly against such a construction.

The Fourth Circuit also observed that if the FDCPA were inapplicable to pleadings, then the 1996 amendment to 15 U.S.C. § 1692e(11) would be rendered superfluous. *Sayyed,* 485 F.3d 226, 231. There is an equally plausible interpretation, discussed supra, that would avoid the constitutional problem. Even if the language of the 1996 Amendment were rendered superfluous, that result must be preferred to striking down the Act as unconstitutional as applied to pleadings.

Addressing the text of the Act, the Fourth Circuit referred to the bona fide error defense under 15 U.S.C. § 1692k(c) as affording "a kind of qualified immunity." Far from being any form of immunity, the FDCPA's bona fide error defense does not include a heightened showing of intent or malice as required by First Amendment jurisprudence, *McDonald v. Smith*, 472 U.S. 479, 485, and there is a split among the circuits as to whether the bona fide error defense applies to anything but clerical errors. See, e.g., *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451-52 (8th Cir. 2001); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir.1989); *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 779 (9th Cir.1982); *Johnson v. Riddle*, 305 F.3d 1107, 1121-22 n. 14 (10th Cir.2002) (collecting cases). See also *Colautti v. Franklin*, 439 U. S. 379, 395 (1979)("This Court has long recognized that the constitutionality of a vague statutory

standard is closely related to whether that standard incorporates a requirement of *mens rea*"). False, deceptive or misleading testimony would be difficult to classify as a clerical error, and no reported decisions have held a debt collector avoided liability under the bona fide error defense for procedures designed to assess a client's testimony for its potential to confuse hypothetical consumers.

VI. Review is required because the Court of Appeals failed to direct further proceedings following notice and suggestion of the Respondent's death, where no personal representative existed, as required by Fed. R. App. P. 43(a).

When a party to an appeal dies, and no personal representative exists, it is incumbent on the Court of Appeals to "direct further proceedings." Fed.R.App.P. 43. Fed.R.App.P. 43(a) provides, in pertinent part:

> If a party dies . . . while a proceeding is pending in the court of appeals, . . . [and] the decedent has no representative, any party may suggest the death on the record, and the court of appeals may then direct appropriate proceedings.

The court should have inquired whether any known survivors existed, and to inquire of them whether any personal representative desired to be substituted. *Gamble v. Thomas*, 655 F.2d 568 (5th Cir. 1981); *Ward v. Edgeton*, 59 F.3d 652, 653-54 (7th Cir.1995); *Johnson v. Morgenthau*, 160 F.3d 897 (2d

Cir. 1998). In the event no response was received that indicated that any representative desired to be substituted, the appellate decision should have been vacated and withdrawn as moot, as it would be unjust to have the judgment below remain binding on Petitioner, through res judicata or collateral estoppel, when "there is no power to review it upon the merits." *U.S. v. Hamburg Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477-478 (1916). It is well-settled that when it becomes apparent that a case has become moot while an appeal is pending in the court of appeals or on or on its way to the Supreme Court, by the death of a party, the judgment below and the appellate decision, are normally vacated with directions to dismiss the complaint. See *United States v. Munsingwear*, 340 U.S. 36 (1950); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288 n. 9 (1982); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979); *Selig v. Pediatric Specialty Care, Inc.* __U.S.__, 127 S.Ct. 3000, 75 USLW 3690 (2007); *Claiborne v. U.S.*, __U.S.__, 127 S.Ct. 2245, 167 L.Ed.2d 1080 (2007); 13A Wright, Miller & Cooper, Fed. Prac. & Proc. Juris.2d § 3533.10. "Even after an appellate court has issued its decision, if it has not yet issued its mandate and the case becomes moot, the court will vacate its decision and dismiss the appeal as moot." *In re Pattullo*, 271 F.3d 898, 900-901 (9th Cir. 2001). See also Fed. R. Civ. P. 25(a)(1).[2]

The Court's order of November 19, failed to address the import of Respondent's death,

[2] Mr. Lipez, counsel for Respondent's heir, Kathie King, advised the undersigned on December 6, that probate estate proceedings were commenced regarding the Respondent on December 6, 2007 in the Belmont County Probate Court, Case No. 07EF579.

substitution, mootness and did not direct "appropriate proceedings." Pet. App. 56.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the decision should be summarily reversed based on the authorities cited above.

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 07a0377n.06
Filed: June 6, 2007
Nos. 06-3048 & 06-3171

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SHERRY GIONIS,
Plaintiff-Appellee,

v.

JAVITCH, BLOCK & RATHBONE, LLP,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: KEITH, COLE, Circuit Judges; and STEEH, District Judge.[FN*]

DAMON J. KEITH, Circuit Judge.
Sherry Gionis entered into a credit card agreement with Direct Merchants Credit Card Bank ("Direct Merchants"). When she became delinquent in her payments, Direct Merchants hired the law firm of Javitch, Block & Rathbone, LLP ("Javitch" or "law firm") to collect the delinquent funds. Javitch's attempts to collect the debt eventually led it to file suit against Gionis in an Ohio state court on November 24, 2003.

No mention of attorney fees appeared in the state court complaint; but Javitch did attach an "Affidavit of Indebtedness & Debt & Non-Military & Contract" ("Affidavit") signed by Erica Vick (a Direct Merchant agent), paragraph 4 of which reads, in part:

> The [credit card] agreement specifically provides that Direct Merchant's Credit Card Bank is entitled to recover, *to the extent permitted by applicable law,* its reasonable attorney's fees and costs incurred in any action to enforce its rights under the agreement.

(JA 20) (emphasis added). Though Ohio law does not permit recovery of attorney fees in connection with any claim involving "personal, family, or household" debt, *see* Ohio Rev.Code Ann. § 1301.21, (which the parties do not dispute), Gionis contends that this language in the Affidavit misleads "the least sophisticated consumer" to think otherwise, and thereby violates the Fair Debt Collection Practices Act ("FDCPA" or "Act"), 15 U.S.C. § § 1692-1692o. In any event, the state court suit against Gionis was settled between the parties.

Gionis then filed her own lawsuit (a class action) against Javitch in federal court. She contended that the law firm violated various provisions of the FDCPA and the Ohio Consumer Sales Practices Act ("OCSPA"), Ohio Rev.Code Ann. § 1345.01, *et seq.*, by attaching the threatening and misleading Affidavit to the state court complaint.

However, the matter never reached a jury. On cross motions for summary judgment, the district court found Javitch (a "debt collector" under the Act, *see Heintz v. Jenkins,* 514 U.S. 291, 294, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995)) was (1) not protected by witness immunity nor litigation immunity, and (2) liable under two provisions of the Act-15 U.S.C. § § 1692e(5) and 1692e(10)-for attaching the Affidavit to the state court complaint. The district court dismissed Gionis's remaining claims.

Unresolved issues of class certification, notice, and remedies remain pending in the district court. Therefore, Javitch filed this interlocutory appeal (purportedly under the "collateral order doctrine") challenging the district court's denial of its immunity claims. Javitch also petitioned for an interlocutory appeal on the liability issues, *see*28 U.S.C. § 1292(b), which another panel of this Court granted. The two appeals were later consolidated.

I

Though neither party disputes our jurisdiction to hear these issues, we have "a duty to consider sua sponte whether appellate jurisdiction is properly invoked[,]"*Mattingly v. Farmers State Bank,* 153 F.3d 336, 336 (6th Cir.1998), and a recent case, *Kelly v. Great Seneca Fin. Corp.,* 447 F.3d 944 (6th Cir.2006), makes clear that we have no independent jurisdiction over Javitch's immunity claims under the collateral order doctrine. *See also Delawder v. Platinum Fin. Servs. Corp.,* 189 Fed.Appx. 369, 371 (6th Cir.2006) (unpublished). But, fortunately for Javitch, the liability issues

(which we have already agreed to hear under 28 U.S.C. § 1292(b)) "cannot be resolved without addressing" Javitch's claims of immunity. *See Chambers v. Ohio Dep't of Human Servs.*, 145 F.3d 793, 797 (6th Cir.1998). That is to say, a favorable finding on the immunity issues may forestall liability under the Act. *See Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C.Cir.1996). Hence, we may properly invoke pendent appellate jurisdiction over these issues. *See Chambers*, 145 F.3d at 797;*Gilda Marx, Inc.*, 85 F.3d at 679.

Unfortunately for Javitch, neither litigation immunity nor witness immunity shields it from liability under the Act. With respect to litigation immunity, Javitch maintains that "[t]he Right to Petition under the First Amendment has been construed by Courts to afford *qualified* immunity [to lawyers engaged in litigation]" (JA 38) (emphasis added), and, at the same time, "[l]awyers possess an *absolute* privilege [under common law] concerning statements they make which are reasonably related to and made in the course of judicial proceedings, and are likewise *absolutely* immune from suit for claims which are based on such statements."(JA 54) (emphases added.) Accepting these propositions as true as applied to Javitch would, of course, undercut *Heintz v. Jenkins*-where the Supreme Court held that "the Act applies to attorneys who 'regularly' engage in consumer-debt-collection activity, *even when that activity consists of litigation.*"514 U.S. at 299, 115 S.Ct. 1489 (emphasis added); *see also*15 U.S.C. § 1692a(6). Javitch does not dispute that it " 'regularly' engage[s] in consumer-debt-collection

activity."*See Heintz,* 514 U.S. at 299, 115 S.Ct. 1489. So any discussion of litigation immunity as applied to lawyers in general (those who do not regularly engage in consumer-debt-collection activity) is of no help to Javitch. The Supreme Court has already said that lawyers, in their function as debt collectors, are covered by the Act.

Javitch also contends that "statements contained in[,] and attached to, the state court complaint cannot serve as the basis for a claim here under the [common law] doctrine of absolute witness immunity."(JA 45.) This assumes that Javitch is a "witness." But it provided no testimony in the Affidavit; only Erica Vick (the Direct Merchant agent) did. Javitch merely attached the Affidavit to the state court complaint, and it points to no authority purporting to extend witness immunity to those who merely attach affidavits.

Even so, we have held that while "testimony presented in the form of an affidavit may be protected under absolute witness immunity," *Todd v. Weltman,* 434 F.3d 432, 439 (6th Cir.2006), the immunity does not extend to "complaining witnesses"-those who help instigate the judicial process by swearing to tell the truth, *id.* at 444.Vick's Affidavit (as in *Todd*) was attached to a state court complaint, and thus "set the wheels of government in motion by instigating a legal action."*Id.* (quoting *Wyatt v. Cole,* 504 U.S. 158, 164-65, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992)) (internal quotation marks omitted). So Vick and, especially, Javitch are not entitled to absolute witness immunity. (But Vick, of course, cannot be sued under the Act, for she is not a "debt collector."

See§ 1692a(6).)

II

We turn now to the issue of whether summary judgment in Gionis's favor was proper. There are no genuine issues of material fact-no dispute as to what was said, who said it, or where it was said; and none about who attached it to the complaint. All that remains is to apply these "basic facts" to the applicable legal standard. *See, e.g., Williams v. Mehra,* 186 F.3d 685, 690 (6th Cir.1999) (en banc) (applying deliberate-indifference standard to facts); *Weaver v. Shadoan,* 340 F.3d 398, 406 (6th Cir.2003) (applying the probable-cause standard to facts); *Scott v. Clay County,* 205 F.3d 867, 877 n. 16 (6th Cir.2000) (same). So review under summary judgment was appropriate, *see* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and we review *de novo, see Moore v. Philip Morris Cos.,* 8 F.3d 335, 339 (6th Cir.1993). Hence, the issue: Did Javitch violate § 1692e(5) or § 1692e(10) of the Act when it attached Erica Vick's Affidavit, which mentioned recovering attorney fees "to the extent permitted by applicable law," to the state court complaint?

The purpose of the Act is "to eliminate abusive debt collection practices by debt collectors[.]"15 U.S.C. § 1692(e).[FN1] Section 1692e of the Act states "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." And, "without limiting the general application of the foregoing, "*id.*,§ 1692e(5) prohibits a "threat to take any

action that cannot legally be taken or that is not intended to be taken. "Section 1692e(10) similarly prohibits, in relevant part, "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt[.]"

In a strict sense, neither § 1692e(5) nor § 1692e(10) has been violated here. The Affidavit only says Direct Merchant "is entitled to recover, *to the extent permitted by applicable law,* its reasonable attorney's fees and costs incurred in any action to enforce its rights under the agreement."(JA 20) (emphasis added). Because the credit card agreement (though not the Affidavit) defines "applicable law" as "federal law, and laws of Arizona," and because the case was filed in Ohio, there was (technically speaking) no "threat to take any action that cannot *legally* be taken,"§ 1692e(5) (emphasis added), nor "use of any *false* representation or *deceptive* means to collect" Gionis's debt, § 1692e(10) (emphases added).

But the Act does not require such a sophisticated interpretation. Quite the contrary, in fact: Courts must view any alleged violation through the lens of the "least sophisticated consumer," *see Smith v. Transworld Sys. Inc.*, 953 F.2d 1025, 1029 (6th Cir.1992)-the usual objective legal standard in consumer protection cases, *see Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir.1993). "The basic purpose of the least-sophisticated-consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd." *Id.* "This effort is grounded, quite sensibly, in the assumption that consumers of below-average sophistication or intelligence are especially

vulnerable to fraudulent schemes." *Id.* at 1319.The standard thus serves a dual purpose: "it (1) ensures the protection of all consumers, even the naive and the trusting, against deceptive debt collection practices, and (2) protects debt collectors against liability for bizarre or idiosyncratic interpretations of collection notices." *Id.* at 1320.

Since Javitch sued in Ohio and the Affidavit leaves the "applicable law" undefined, the least sophisticated consumer (who is both "naive" and "below-average sophistication," *see id.* at 1319) would, without question, conclude the "applicable law" to be Ohio law. (It does not matter that a more sophisticated consumer would have discovered that the "applicable law" is actually "federal law, and laws of Arizona" under the credit card agreement. (JA 167.)) And the phrase "to *the* extent permitted" suggests (at least to the least sophisticated consumer) that *some* extent is in fact permitted under Ohio law. "Why else," the consumer would wonder, "would Javitch attach this language to the complaint if Ohio law does *not* permit attorney fees here?"

Yet the threatening language appeared in a court filing-where one seeks remedies, not make empty threats-and that arguably could be understood by the least sophisticated consumer as an actual "attempt" to collect attorney fees (not a "threat" per se) and thus not actionable under § 1692e(5).*See*§ 1692e(5) (prohibiting the "*threat* to take any action that cannot legally be taken" (emphasis added)). After all, "What other reason would the statement appear in a court proceeding if Javitch were not *attempting* to collect attorney fees?," the consumer

may again ask. A few lower courts, in fact, have refused to find a violation under § 1692e(5) where "[d]efendants did not *threaten* to take [an unlawful] action, but actually took it by filing the complaint." *See, e.g., Delawder v. Platinum Fin. Servs. Corp.*, 443 F.Supp.2d 942, 948 (S.D.Ohio 2005) (emphasis in original) and cases cited therein.

But, in this context, "attempts" and "threats" are not necessarily mutually exclusive concepts, for when we keep the Act's overarching principles in mind-"to eliminate abusive debt collection practices by debt collectors,"§ 1692(e), and to prevent "false, deceptive, or misleading representation [,]" § 1692e-whether the Affidavit's metaphysical description is more an "attempt" or more a "threat" is essentially wordplay. No semantical recasting alters the intimidating effect on the least sophisticated consumer: that she "would be confused, and reasonably might feel pressured to immediately pay the debt, even if she disputed its validity, in order to avoid the possibility of having to also pay [the debt collector's] attorney fees at some later date." *Gionis v. Javitch,* 405 F.Supp.2d 856, 867 (S.D. Ohio 2005).

This is so because even if the least sophisticated consumer would view the Affidavit's attorney fees language as an actual "attempt" to collect attorney fees, the attempt would nonetheless embody an ongoing threat that likely higher attorney fees would be assessed so long as the litigation continues-an action that cannot legally be taken in Ohio. *See* § 1692e(5). Suppose, on the other hand, the least sophisticated consumer would view the Affidavit's attorney fees language as a simple

threat (not an actual attempt) to collect attorney fees at some later date (should Javitch choose to). That threat is likewise one that cannot legally be taken in Ohio.

Javitch's failure to assert the attorney fees language in the complaint's "prayer of relief" section does not cure the threat. *See Veach v. Sheeks,* 316 F.3d 690, 693 (7th Cir.2003) ("When there are two different accounts of what a debtor actually owes the creditor, that one version is the correct description does not save the other ... under the unsophisticated debtor standard...."). The least sophisticated consumer would not realize what a trained lawyer would-that a failure to assert a request for attorney fees in a complaint's "prayer of relief" generally bars recovery of such relief. *See* Ohio Civ. P.R. 8(A). Hence, either way we slice it, an unlawful "threat" to collect attorney fees was made in the Affidavit, violating § 1692e(5), which also amounted to a "false representation or deceptive means to collect or attempt to collect a[ ] debt[,]" violating § 1692e(10).

Javitch believes that attaching the Affidavit to the complaint would be no different than attaching the entire credit card agreement to the complaint, and that to hold it liable here would "effectively prohibit creditors from including fee-shifting terms in their cardholder agreements, and hamper their efforts to enforce [those] terms." (Appellant's Br. 22.) But this ignores two significant distinctions. Foremost, had Javitch attached the credit card agreement to the complaint, there would be less room to argue that the least sophisticated consumer would feel threatened in the same manner as here since the

agreement explicitly defines "applicable law" as "federal law, and laws of Arizona[.]" (JA 167.) The Affidavit does not (conveniently) make this clarification, and such an omission leaves room for the least sophisticated consumer to conclude the "applicable law" to be Ohio law.

There is another distinction. The Affidavit chose to point out the fact that the "agreement *specifically* provides" for recovery of attorney fees under the applicable law (and, again, does so without mentioning what that "applicable law" is). (JA 20) (emphasis added.) Certainly, this is more threatening than attaching the entire Agreement-where no terms or conditions are "specifically" isolated for the consumer's attention. *See Barany-Snyder v. Weiner,* No. 06-2111, 2007 WL 210411, at *8 (N.D. Ohio Jan.24, 2007) (unpublished) (discussing this distinction). Hence, contrary to Javitch's thinking, our holding does not "prohibit creditors from including fee-shifting terms in their cardholder agreements, [or] hamper their efforts to enforce terms."(Appellant's Br. 22.)

One more hurdle remains in this matter: Javitch did not utter the statement in the Affidavit; Erica Vick did. Javitch therefore contends that imputing Erica Vick's words onto it would essentially amount to impermissible "vicarious liability." This is not so. Had Vick independently made the threat to Gionis (with no assistance from Javitch), the imposition of liability on Javitch for Vick's threatening words could be classified as "vicarious liability." *See* Restatement (Third) of Torts § 13 (2000). But Javitch did not passively stand by as Vick made the threat. It instead chose to communicate the

threatening language to Gionis-in a lawsuit no less. And any consumer, especially the least sophisticated one, could view the very act of doing so as an adoption of Vick's threat-and thus a "threat" within itself. *Cf. United States v. Cox,* 957 F.2d 264, 266 (6th Cir.1992) ("A threat is ... an appearance to the victim.") (internal quotation marks omitted). This is all the more true in Ohio given that Ohio's Civil Procedure Rule 10(c) provides that "[a] copy of any written instrument attached to a pleading is part of the pleading for *all* purposes." Ohio Civ. P.R. 10(c) (emphasis added). Hence, to hold Javitch liable for *its own* actions does not invoke vicarious liability.

III

Accordingly, we conclude that Javitch made a "threat to take an [ ] action that cannot legally be taken," in violation of § 1692e(5), which also amounted to "false representation or deceptive means to collect or attempt to collect a[ ] debt[,]" in violation of § 1692e(10). For these reasons, we **AFFIRM** the district court's grant of summary judgment.

GEORGE C. STEEH, District Judge, dissenting.
I respectfully dissent.

The underlying facts in this case are straightforward. Appellee Sherry Gionis was sued in an Ohio state court for a credit card debt owing to Direct Merchant's Credit Card Bank (DMCCB). Gionis signed an agreement, at the time she took on the credit card, that the applicable law would be

that of Arizona.[FN1] An affidavit filed by the appellant-attorneys to collect the unpaid debt included language that DMCCB "is entitled to recover, to the extent permitted by applicable law, its reasonable attorney's fees and costs incurred in any action to enforce its rights under the agreement." As noted by the majority, the case was promptly settled, and DMCCB never sought any attorney's fees.

Given the particular facts of this case, it unreasonably stretches the statutory language to conclude that the action complained of in this lawsuit violated the Fair Debt Collection Practices Act.[FN2]As my colleagues concede, "[i]n a strict sense, neither § 1692e(5) nor § 1692e(10) has been violated here." Nowhere did the complaint or affidavit affirmatively state that attorney's fees would be sought. Furthermore, there is no record that appellee felt undue pressure resulting from the statement in the affidavit, or that there was any prior contact between appellee and appellant which might support an inference that the law firm threatened the collection of its fees from the perspective of "the least sophisticated consumer."

I cannot agree that any authority cited by appellee lends significant support to her position. There is no precedent supporting appellee's argument that a complaint which itself did not make claim to attorney's fees, appending an attachment which did not state an affirmative intention to collect attorney fees, may nonetheless be found to have violated § 1692e(5) or (10). For instance, in the case of *Veach v. Sheeks,* 316 F.3d 690 (7th Cir.2003), relied on in part by appellee, the Seventh

Circuit's ruling actually reverses the lower court's entry of summary judgment for the defendant on the FDCPA claim because the defendant debt collector, in addition to claiming that the debt owed included attorney fees, had represented the amount of the debt to be three times the actual debt, i.e. applying treble damages, where such an award may only be made by court order. Furthermore, the mention of attorney's fees was an affirmative statement in the complaint itself that such fees were owed, [FN3] rather than a mere recitation of text from a cardholder agreement in an affidavit. *See id.* at 693. *Veach* is so factually distinguishable from the instant case that the opinion lends no assistance in this decision.

In the recent, unpublished case of *Barany-Snyder v. Weiner*, No. 06-2111, 2007 WL 210411 (N.D. Ohio Jan. 24, 2007) (unpublished), in which attorneys for the Baldwin Wallace College were sued for allegedly improper collection of unpaid school debt, the district court held that "[m]erely attaching an agreement which includes an attorneys' fee provision to a complaint and a brief does not constitute a threat to exercise that provision."[FN4] This holding followed its discussion of the elements required for a claim under § 1692e(5): "(1) a threat to take legal action and (2) the inability to take that action lawfully." *Id.* at *7, citing *Wright v. Asset Acceptance Corp.*, No. C-3-97, 375, 2000 WL 33216031, *1 n. 7, 1999 U.S. Dist. LEXIS 20675, *5 n. 7 (S.D. Ohio Jan. 3, 2000). I agree with the decision rendered by Judge Gaughan in that case, and I cannot find a meaningful distinction between attaching a two page "revolving agreement" that was the subject of the lawsuit in the *Barany-*

Snyder[FN5] case and quoting a provision of the cardholder agreement in the instant case.[FN6]Here, even if appellant could not lawfully seek attorney's fees in Ohio, there is no threat to do so stated or implied in the complaint or affidavit.

Although Judge Gaughan in *Barany-Snyder* distinguished the district court's decision in *Gionis*, pointing out that the language complained of in the *Gionis* case was contained in an affidavit, rather than a copy of the cardholder agreement, I find her reasoning equally applicable to this matter, and cannot find that under the facts of this case, even the "least sophisticated consumer" would conclude that defendant *threatened* to take illegal or unintended action, or b) that defendant used a *false representation or deceptive means* to collect or attempt to collect a debt. I would reverse the district court's grant of summary judgment.

FN1. After oral arguments, Javitch submitted a letter under Rule 28(j), *see*Fed. R.App. P. 28(j), providing the Court with a citation to a recent Seventh Circuit case, *Beler v. Blatt,* 480 F.3d 470 (7th Cir.2007).*Beler* questions (but does not decide) whether the Act regulates the content of state court filings in particular. *But see Veach v. Sheeks,* 316 F.3d 690, 691-92, 693 (7th Cir.2003) (applying the Act to the content of "a summons and complaint for Indiana small claims court proceedings"). But the reason for the *Beler* court's incertitude is not entirely clear from its opinion, and thus *Beler* lends no particular

support to Javitch's position.

And though it postures the *Beler* case as a "supplemental" citation, Javitch's appellate briefs do not provide any reason to think that the Act does not cover the content of *state* court filings in particular, *see United States v. Nason,* 9 F.3d 155, 163 (1st Cir.1993) ("[A] letter submitted pursuant to [R]ule 28(j) *cannot* raise a new issue.") (internal quotation marks omitted) (alterations in original); and the Court sees none.

FN1. Although it appears that appellant waived its argument that the case may be disposed of on the basis that Arizona law-which allows the collection of attorney's fees in connection with consumer debt-governed Ms. Gionis' contract with DMCCB, the fact remains that the cardholder agreement is in the record and there is no dispute that it contains the Arizona choice of law provision.

FN2. This action certainly does not fall within the scope of practices the FDCPA was designed to curb, such as abusive phone calls, false and deceptive debt collection letters, and other patently unfair antics described in the statute's legislative history. *See Lewis v. ACB Business Services, Inc.,* 135 F.3d 389, 398 (6th Cir.1998). In fact, the careful placement of the reference to attorney fees in the affidavit, rather than the complaint, and the fact that plaintiff made no affirmative representation that it was

entitled to attorney fees, indicates an attempt on the part of the plaintiff to comply with the FDCPA.

FN3. "[T]he Defendant is indebted to the Plaintiff in the sum of $ 1,050 as treble damages for a bad check in the sum of $ 350.00, plus reasonably [sic] attorney fees as permitted by law."*Id.* at 693.

FN4. Discussing, in part, the holding of the court below in the instant case. *See Gionis v. Javitch, Block & Rathbone,* 405 F.Supp.2d 856, 866 (S.D. Ohio 2005).

FN5. Notably, the two page "revolving agreement" did not contain, as the cardholder agreement in the instant case did, a choice of law provision indicating applicable law of any state other than Ohio.

FN6. In fact, the two page "revolving agreement" contained language that was arguably more "threatening":
I/We understand that upon default of any, or all of the terms and conditions of this credit agreement and upon proper service of a NOTICE OF DEFAULT by the College, all signers immediately become, at the option of the college, liable for attorney fees and/or actual or reasonable collection costs which may be added to the total amount due.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Sherry GIONIS, Plaintiff,

v.

JAVITCH, BLOCK & RATHBONE, Defendant.

No. 2:04 CV 1119

MEMORANDUM OPINION & ORDER

HOLSCHUH, Senior District Judge.

Plaintiff Sherry Gionis filed suit against the law firm of Javitch, Block & Rathbone ("Javitch"), on behalf of herself and others similarly situated, alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, and the Ohio Consumer Sales Practices Act ("OCSPA"), Ohio Revised Code § 1345.01, *et seq.* This matter is currently before the Court on four pending motions: (1) Defendant's motion to dismiss or, in the alternative, motion for summary judgment (Record at 4); (2) Plaintiff's motion for extension of time to file her motion for class certification (Record at 18); (3) Defendant's motion for leave to file a supplemental memorandum in support of its immunity defense (Record at 22); and (4) Plaintiff's motion for partial summary judgment on the issue of liability (Record at 29).

I. Background and Procedural History

The relevant facts of this case are undisputed. Plaintiff entered into a credit card agreement with Direct Merchants Credit Card Bank ("Direct Merchants"). When she became delinquent in her payments, Direct Merchants filed suit against her in the County Court of Belmont County, Ohio. Direct Merchants was represented in that action by Defendant law firm, Javitch.

The suit, filed on November 24, 2003, alleged that Plaintiff owed Direct Merchants $2,040.98. The prayer for relief sought "$2,040.98 with interest at the rate of 10.00% per annum from date of judgment, and costs of the within action." (Stip. of Facts ¶ 3; Ex. A to Stip. of Facts). Defendant attached to the complaint an "Affidavit of Indebtedness & Debt & Non-Military & Contract" signed by Erica Vick, an agent of Direct Merchants. (Stip. of Facts ¶ 5; Ex. B to Stip. of Facts). Paragraph 4 of Vick's affidavit reads as follows:

> In the ordinary course of business DIRECT MERCHANTS CREDIT CARD BANK maintains or has access to copies of revolving credit agreements/credit card applications entered into between DIRECT MERCHANTS CREDIT CARD BANK and its customers enabling such customers to open revolving credit accounts with DIRECT MERCHANTS CREDIT CARD BANK. The agreement specifically provides that DIRECT MERCHANTS CREDIT CARD BANK is entitled to recover, to the extent permitted by applicable law, its reasonable

> attorney's fees and costs incurred in any action to enforce its rights under the agreement.

Vick Aff. ¶ 4.[FN1]

> FN1. The cardmember agreement reads as follows: "Upon default, we have the right to terminate or suspend your credit privileges under this Agreement ... and to sue you for what you owe. You will pay our court costs, reasonable attorney fees and other collection costs related to the default to the extent permitted by applicable law." (Connolly Decl. ¶ 3; Ex. 1 to Connolly Decl.).

The Belmont County suit was quickly settled and Direct Merchants dismissed all remaining claims against Ms. Gionis without prejudice. However, on November 23, 2004, Plaintiff filed a class action suit against Javitch, asserting violations of the FDCPA and the OCSPA. The basis for her complaint is as follows. In Ohio, attorney fees are not recoverable in connection with any claim involving consumer debt. *See*Ohio Revised Code § 1301.21. Plaintiff concedes that Defendant did not seek, or recover, attorney fees in connection with the Belmont County suit. She nevertheless contends that Defendant engaged in deceptive, unfair and unconscionable debt collection activities when it attached to that complaint Vick's affidavit, reciting that, pursuant to the cardmember agreement, Direct Merchants was entitled to recover, to the extent permitted by applicable law, its reasonable attorney fees.

The proposed class consists of all persons against whom Defendant filed an Ohio civil consumer collection action since November 23, 2003, where an attached affidavit asserted that the creditor was entitled to attorney fees. (Compl. at ¶ 11). Plaintiff seeks statutory damages, attorney fees and costs, a declaration that Defendant's conduct is unlawful, and an injunction barring Defendant from engaging in further unlawful conduct.

Defendant filed a motion to dismiss or, in the alternative, motion for summary judgment. Pursuant to Fed.R.Civ.P. 56(f), Plaintiff sought and was granted leave to engage in limited discovery prior to responding to Defendant's motion, which the Court agreed to treat as a motion for summary judgment. That motion is now fully briefed. In connection with the pending motion, the parties have submitted a Stipulation of Facts. After Defendant's motion was fully briefed, Plaintiff also filed a motion for partial summary judgment on the issue of liability.

II. Defendant's Motion for Leave to File Supplemental Memorandum in Support of Immunity Defense *Instanter*

As an initial matter, the Court grants Defendant's unopposed motion for leave to file a supplemental memorandum in support of its immunity defense *instanter*.

III. Cross Motions for Summary Judgment

A. Standard for Granting Summary Judgment

Although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules, which are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 1). The standard for summary judgment is found in Federal Rule of Civil Procedure 56(c):

> [Summary judgment] ... shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is ... [and where] no genuine issue remains for trial, ... [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 467, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) (quoting *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 967 (1944)). *See also Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1347 (6th Cir.1994).

Moreover, the purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lashlee v. Sumner,* 570 F.2d 107, 111 (6th Cir.1978). The

court's duty is to determine only whether sufficient evidence has been presented to make the issue of fact a proper question for the jury; it does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Weaver v. Shadoan*, 340 F.3d 398, 405 (6th Cir.2003).

In a motion for summary judgment, the moving party bears the initial burden of showing that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law. *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir.2003). All the evidence and facts, as well as inferences to be drawn from the underlying facts, must be considered in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Wade v. Knoxville Util. Bd.*, 259 F.3d 452, 460 (6th Cir.2001). Additionally, any "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-60, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48, 106 S.Ct. 2505 (emphasis in original). A "material" fact is one that "would have [the] effect of establishing or refuting one of [the] essential

elements of a cause of action or defense asserted by the parties, and would necessarily affect [the] application of [an] appropriate principle of law to the rights and obligations of the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir.1984). *See also Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. An issue of material fact is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. *See also Leary*, 349 F.3d at 897.

If the moving party meets its burden, and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548. The nonmoving party must demonstrate that "there is a genuine issue for trial," and "cannot rest on her pleadings." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir.1997).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed.R.Civ.P. 56(e).

The existence of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505. The nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Companies, Inc.,* 8 F.3d 335, 340 (6th Cir.1993). The court may, however, enter summary judgment if it concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the presented evidence. *Anderson,* 477 U.S. at 251-52, 106 S.Ct. 2505; *Lansing Dairy, Inc.,* 39 F.3d at 1347.

The standard of review for cross-motions of summary judgment does not differ from the standard applied when a motion is filed by only one party to the litigation. *Taft Broad. Co. v. U.S.,* 929 F.2d 240, 248 (6th Cir.1991). "The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts. Rather, the court must evaluate each party's motion on its own merits." *Id.* (citations omitted).

B. Discussion

In Ohio, creditors are not permitted to recover

attorney fees incurred in connection with debt collection suits involving "personal, family or household" debt. *See* Ohio Revised Code § 1301.21. The parties have stipulated that Plaintiff's credit card debt falls within this definition. (Stip. of Facts ¶ 4). It is undisputed that, in the state court action filed by Defendant on behalf of Direct Merchants, the complaint did not include a claim for attorney fees in its prayer for relief. Direct Merchants sought $2,040.98, the exact balance due on Plaintiff's credit card account, plus interest and costs. However, Defendant attached to the state court complaint Erica Vick's affidavit which stated that, pursuant to the terms of the cardmember agreement, Direct Merchants was entitled to recover reasonable attorney fees "to the extent permitted by applicable law." The question in this case is whether Defendant violated either the FDCPA or the OCSPA by attaching the affidavit containing that statement to the complaint.

1. FDCPA

The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).[FN2] Debt collectors who violate its provisions are liable for consequential damages, plus up to $1,000 in additional damages, the costs of the action, and reasonable attorney's fees. In a class action, plaintiffs may also recover $500,000 or

1 percent of the debt collector's net worth, whichever is less. *See*15 U.S.C. § 1692k(a).

> FN2. The parties have stipulated that Defendant is a law firm that "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." (Stip. of Facts ¶ 2). Defendant therefore qualifies as a "debt collector" subject to liability under the FDCPA. *See*15 U.S.C. § 1692a(6).

Plaintiff alleges that Defendant engaged in deceptive, unfair, and unconscionable debt collection practices in violation of several provisions of the FDCPA when Defendant attached Vick's affidavit to the complaint. Specifically, Plaintiff alleges that Defendant violated the FDCPA by:

> (1) falsely representing the character, amount or legal status of the debt in violation of 15 U.S.C. § 1692e(2)(A);
> (2) falsely representing the services rendered or compensation which may be lawfully received in connection with the collection of the debt in violation of 15 U.S.C. § 1692e(2)(B);
> (3) threatening to take action that cannot be legally taken in violation of 15 U.S.C. § 1692e(5);
> (4) attempting to collect an amount in excess of what is lawfully owed in violation of 15 U.S.C. § 1692f(1); and
> (5) generally utilizing false and deceptive means to collect or to attempt to collect a

debt in violation of 15 U.S.C. § 1692e(10).

Compl. ¶ 10. Plaintiff later filed a notice that she also intends to rely on 15 U.S.C. § 1692d as a basis for her action. (Record at 14). That subsection prohibits debt collectors from engaging in "any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d.

Plaintiff has moved for summary judgment on the issue of liability. Defendant, however, urges the Court to grant summary judgment in its favor on all of the FDCPA claims. Defendant argues that: (a) it is not responsible for the alleged violations; (b) it is immune from suit; and (c) the conduct alleged does not violate the FDCPA. The Court will discuss each of these in turn.

a. Defendant's Responsibility for Alleged Violation

Defendant first argues that it cannot be held responsible for the allegedly offending statement contained in Vick's affidavit. It notes that the affidavit was drafted and executed by its client, Direct Merchants, whose conduct is not subject to liability under the FDCPA because Direct Merchants is not a "debt collector." Defendant further argues that it cannot be held "vicariously liable" for statements made in that affidavit. However, as Plaintiff notes, she is not seeking to hold Defendant vicariously liable for the conduct of its client. Instead, she is seeking to hold Defendant liable for its own conduct. She alleges

that Defendant violated the FDCPA by attaching the affidavit to the complaint it drafted and filed in state court.

Defendant cannot escape liability under the FDCPA by blaming its client for the contents of the affidavit. When Defendant attached a copy of the affidavit to the complaint, the affidavit became part of the complaint. *See*Ohio R. Civ. P. 10(C)("[a] copy of any written instrument attached to a pleading is a part of the pleadings for all purposes"); Fed.R.Civ.P. 10(c)("[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). If the contents of that affidavit, read in conjunction with the complaint itself, violate the provisions of the FDCPA, Defendant may be held legally responsible.

b. Immunity

Defendant also claims that it is immune from liability on several grounds. First, Defendant claims that, pursuant to the First Amendment to the United States Constitution, "lawyers and their clients who participate in judicial proceedings are entitled to absolute immunity from suit for their statements which are reasonably related to and made in the course of those proceedings." (Mot. to Dismiss at 9). Second, Defendant contends that because Vick's affidavit was made under oath, and that affidavit was filed in connection with a judicial proceeding, Defendant is entitled to common law witness immunity.

These same arguments have been repeatedly

rejected by my colleagues on this Court in connection with FDCPA suits. *See Hartman v. Asset Acceptance Corp.*, No. 1:03-cv-113, 2004 U.S. Dist. LEXIS 24845 (S.D.Ohio Sept. 29, 2004)(rejecting claims of absolute witness immunity and litigation privilege); *Blevins v. Hudson & Keyse, Inc.*, 395 F.Supp.2d 655 (S.D.Ohio 2004)(same); *Delawder v. Platinum Fin. Servs. Corp.*, No. 1:04-cv-680 (S.D. Ohio April 29, 2005)(Record at 22; Supp. Authority submitted by Defendant) (same) [FN3]; *Kelly v. Great Seneca Fin. Corp.*, No. 1:04-cv-615 (S.D. Ohio June 16, 2005)(same); *Todd v. Weltman, Weinberg & Reis Co., LPA*, 348 F.Supp.2d 903 (S.D.Ohio 2004)(rejecting claim of witness immunity in connection with FDCPA suit). In each of those cases, my colleagues discussed at length their reasons for rejecting the claims of immunity, and it would be pointless for me to repeat what they have already stated so eloquently. Suffice it to say that I agree with the reasoning expressed in those opinions and find no merit to Defendant's claims of immunity.[FN4] The Court now turns to the merits of Plaintiff's alleged violations of the FDCPA.

FN3. Defendants have appealed the decision in the *Delawder* case; that appeal is still pending.

FN4. Defendant also argues that, to the extent it is immune from suit for statements made in the course of litigation pursuant to the First Amendment, it is also immune from suit under the petition and speech clauses of the Ohio Constitution. Having rejected

Defendant's First Amendment immunity argument, the Court also rejects this argument.

c. Merits of the Alleged Violations

The FDCPA prohibits debt collectors from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. The question in this case is whether Defendant engaged in deceptive or misleading debt collection practices by attaching Vick's affidavit to the complaint.

The parties agree that in determining whether a debt collection practice is deceptive or misleading, that practice "must be viewed objectively from the standpoint of the 'least sophisticated consumer.' "*Taylor v. Perrin, Landry, deLaunay & Durand,* 103 F.3d 1232, 1236 (5th Cir.1997). *See also Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 400 (6th Cir.1998). This standard "protects all consumers, the gullible as well as the shrewd." *Clomon v. Jackson,* 988 F.2d 1314, 1318 (2d Cir.1993). However, it also presumes that the consumer possesses "a rudimentary amount of information about the world" and is willing "to read a collection notice with some care." *Id.* at 1319. As the Second Circuit noted in *Clomon,* this standard serves the dual purpose of protecting all consumers, including "the naive and the trusting," from deceptive debt collection practices, and protecting debt collectors "against liability for bizarre or idiosyncratic interpretations of collection notices." *Id.* at 1320.

As noted earlier, creditors, in Ohio, are not permitted to recover attorney fees in connection with debt collection actions involving personal, family, or household debt. Plaintiff concedes that the complaint Defendant filed against her in state court does not mention attorney fees. On its face, it prays only for damages "in the amount of $2,040.98 with interest ... and costs of the within action." Plaintiff also admits that $2,040.98 is the exact balance she owed to Direct Merchants on her credit card account; therefore, it is impossible that the amount of the debt was padded to include hidden attorney fees. The affidavit attached to the complaint, however, states that the cardmember agreement provides that Direct Merchants "is entitled to recover, to the extent permitted by applicable law, its reasonable attorney's fees." Plaintiff argues that, after reading the complaint in conjunction with the affidavit, the "least sophisticated consumer" would be confused about whether she might be held liable for Direct Merchant's attorney fees in addition to the other relief sought.

Plaintiff alleges that by attaching the affidavit containing this statement to the complaint, Defendant violated the FDCPA by:

> (1) falsely representing the character, amount or legal status of the debt in violation of 15 U.S.C. § 1692e(2)(A);
> (2) falsely representing the services rendered or compensation which may be lawfully received in connection with the collection of the debt in violation of 15 U.S.C. § 1692e(2)(B);

(3) threatening to take action that cannot be legally taken in violation of 15 U.S.C. § 1692e(5);
(4) attempting to collect an amount in excess of what is lawfully owed in violation of 15 U.S.C. § 1692f(1); and
(5) generally utilizing false and deceptive means to collect or to attempt to collect a debt in violation of 15 U.S.C. § 1692e(10).

Compl. ¶ 10. Plaintiff later filed a notice of intent to also rely on 15 U.S.C. § 1692d. (Record at 14).

The Court finds that Defendant is entitled to summary judgment on Plaintiff's claims brought under 15 U.S.C. § § 1692e(2)(A), 1692e(2)(B), 1692d and 1692f(1). However, the Court finds that Plaintiff is entitled to summary judgment on the issue of liability with respect to the FDCPA claims brought under 15 U.S.C. § § 1692e(5) and 1692e(10).

i) 15 U.S.C. § § 1692e(2)(A) and (B)

Section 1692e(2)(A) prohibits debt collectors from falsely representing "the character, amount or legal status of any debt." Section 1692e(2)(B) prohibits debt collectors from falsely representing "compensation which may be lawfully received by any debt collector for the collection of a debt." Plaintiff alleges that Defendant violated these provisions by attaching Vick's affidavit, asserting a possible entitlement to attorney fees, to the complaint. The Court disagrees. While the "least sophisticated consumer" may find Defendant's

conduct deceptive and misleading, there is no evidence to support a finding that Defendant made any *false* representations concerning "the character, amount, or legal status" of Plaintiff's debt, or that Defendant made any *false* representations concerning compensation it could lawfully receive in connection with the collection of the debt.

Edward Connolly, an Agency Auditor for Direct Merchants, stated, "[w]e do not seek to recover attorney fees in Ohio in connection with our consumer credit card claims, as it is our understanding that attorney fees are not recoverable under Ohio law in connection with consumer transactions." (Connolly Decl. ¶ 8). It is undisputed that the complaint Defendant filed in state court did not seek attorney fees. Direct Merchants sought to recover the exact balance due on Plaintiff's credit card, plus interest and costs.

Furthermore, Vick's affidavit, attached to the complaint, contains no false representations concerning the character, amount, or legal status of the debt. It correctly lists the balance on Plaintiff's credit card account as $2,040.98, and accurately recites the terms of the cardmember agreement. Plaintiff did agree that, upon default, she would pay Direct Merchant's "court costs, reasonable attorney fees and other collection costs related to the default to the extent permitted by applicable law." (Ex. 1 to Connolly Decl.). Neither the complaint nor the affidavit asserts an absolute entitlement to attorney fees, or contains any false statements about the amount owed. Under these circumstances, the Court finds that Defendant is

entitled to judgment as a matter of law on the alleged violations of 15 U.S.C. § § 1692e(2)(A) and (B).

ii) 15 U.S.C. § 1692d

On February 16, 2005, Plaintiff filed a notice of intent to rely on 15 U.S.C. § 1692d as an additional basis for her claim. That subsection prohibits debt collectors from engaging in "any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. Neither Plaintiff's complaint nor her notice of intent to rely on additional authority contains any factual allegations to support a finding that Defendant violated § 1692d. Plaintiff appears to argue that Defendant violated § 1692d simply by attaching the affidavit to the complaint.

While Defendant's conduct violates other subsections of the FDCPA, it does not violate § 1692d. The statute lists several examples of "conduct the natural consequence of which is to harass, oppress, or abuse," including the use of violence or threats of violence, the use of obscene or profane language, the publishing of a list of debtors who have refused to pay a debt, the advertising for sale of a debt in order to coerce payment, and the making of harassing telephone calls. *Id.* In this case, all Defendant is accused of doing is attaching an affidavit reciting the terms of the cardmember agreement to the complaint. This conduct is actionable under other subsections of the FDCPA, but it clearly falls outside the scope of the kinds of

activities prohibited by § 1692d. Defendant is therefore entitled to summary judgment on this claim.

iii) 15 U.S.C. § 1692f(1)

Plaintiff also alleges that Defendant violated 15 U.S.C. § 1692f(1)"by attempting to collect an amount in excess of what is lawfully owed,"*i.e.*, attorney fees. (Compl.¶ 10). Section 1692f(1) prohibits debt collectors from collecting "any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. § 1692f(1).

The Court finds that Defendant is entitled to summary judgment on this claim as well. There is absolutely no evidence that Defendant ever attempted to collect attorney fees from Plaintiff. It is undisputed that the complaint does not include attorney fees in its prayer for relief, and Plaintiff has not alleged that Defendant made any other effort to collect attorney fees from her. Again, the alleged wrongdoing stems solely from the fact that Defendant attached Vick's affidavit to the complaint. However, Vick's recitation of the terms of the cardmember agreement concerning Direct Merchants' possible entitlement to attorney fees, does not constitute an attempt by Defendant to collect any such fees.

iv) 15 U.S.C. § § 1692e(5) and 1692e(10)

Section 1692e(5) prohibits debt collectors from threatening "to take any action that cannot legally be taken or that is not intended to be taken." 15 U.S.C. § 1692e(5). Section 1692e(10) prohibits debt collectors from using "any ... deceptive means to collect or attempt to collect any debt." 15 U.S.C. § 1692e(10). Plaintiff alleges that, by attaching Vick's affidavit to the complaint, Defendant violated both of these provisions. The Court agrees.

Defendant notes that it is undisputed that the complaint includes no request for attorney fees, and Defendant made no other attempts to recover attorney fees from Plaintiff. It is also undisputed that Vick's affidavit simply recites the terms of the cardmember agreement. Plaintiff did agree that, upon default, she would pay Direct Merchants' "court costs, reasonable attorney fees and other collection costs related to the default to the extent permitted by applicable law." Defendant argues that since applicable Ohio law does not permit the recovery of attorney fees, and no attorney fees were sought, there was no harm in attaching Vick's affidavit to the complaint.

For several reasons, the Court rejects this argument as unduly simplistic. In the Court's view, the "least sophisticated consumer," reading the complaint in conjunction with the affidavit, would be confused about whether she might be held liable for Direct Merchants' attorney fees if she did not immediately pay the debt allegedly owed. Notably, the affidavit does not assert a right to recover attorney fees "*if* permitted by applicable

law." Instead, it asserts a right to recover attorney fees "*to the extent* permitted by applicable law." A consumer would not necessarily interpret this statement to mean that attorney fees may not be recoverable *at all* in some jurisdictions. A consumer could just as easily interpret this language to mean only that there might be a cap on the *amount* of attorney fees that Direct Merchants could recover, or that a judge would later decide to what extent Plaintiff would be indebted to Defendant for attorney fees.

Even if the agreement provided for the recovery of attorney fees only "*if* permitted by applicable law," this would not completely cure the problem. The "least sophisticated consumer" obviously would not know whether "applicable law" permitted the recovery of attorney fees. That person should not be expected to research the law, or to hire an attorney, to find out whether the creditor could legally collect attorney fees in that particular jurisdiction. Furthermore, the "least sophisticated consumer" would not know that a failure to include a request for attorney fees in the prayer for relief might preclude Direct Merchants from recovering attorney fees once the litigation had concluded.

The Court therefore finds that the "least sophisticated consumer," reading the affidavit in conjunction with the complaint, would be confused, and reasonably might feel pressured to immediately pay the debt, even if she disputed its validity, in order to avoid the possibility of having to also pay Direct Merchants' attorney fees at some later date. Because the "least sophisticated consumer" could interpret Vick's affidavit as a

threat to collect attorney fees, an action that clearly "cannot legally be taken," the Court concludes that Defendant's conduct violated 15 U.S.C. § 1692e(5). For the same reasons, the Court finds that Defendant used "deceptive means" to attempt to collect the debt in violation of 15 U.S.C. § 1692e(10).

As Defendant notes, Direct Merchants likely refers to the "attorney fees" provision of the cardmember agreement in its boilerplate affidavit because there are jurisdictions in which Direct Merchants does business where creditors *are* permitted to recover attorney fees in connection with consumer debts. However, as discussed above, the "least sophisticated consumer" does not know, and should not be expected to know, whether attorney fees are recoverable in her jurisdiction. In those jurisdictions where attorney fees are recoverable, Direct Merchants would, presumably, also include a claim for attorney fees in its prayer for relief. In that situation, it would be acceptable to attach the boilerplate affidavit, with its reference to attorney fees, to the complaint. The two documents can be read together without creating any confusion about the extent of the consumer's potential liability. However, in those jurisdictions in which attorney fees are not recoverable, like Ohio, the affidavit's reference to attorney fees is misleading and leaves the consumer to wonder about the nature and extent of her potential liability. In those jurisdictions, Defendant should attach a modified version of the affidavit, deleting all references to attorney fees to eliminate all possibility of confusion.

While neither party has cited any authority directly on point, and the Court has been unable to find any, two of the cases cited by Plaintiff are instructive, even though they are factually distinguishable. In *Van Westrienen v. Americontinental Collection Corp.*, 94 F.Supp.2d 1087 (D.Or.2000), the court granted plaintiffs' motion for summary judgment with respect to a claimed violation of 15 U.S.C. § 1692e(10), which forbids the "use of any false representation or deceptive means to collect or attempt to collect any debt." Fischer, the debt collector in that case, had threatened to collect attorney fees if the debtor challenged the debt. The court noted:

> Even though Fischer's statement is technically not false or deceptive, plaintiffs nevertheless are entitled to summary judgment. Had Fischer been entirely forthright, he would have explained that under the FDCPA he could collect attorney fees only if: (1) plaintiffs contested defendants' debt collection methods by filing a lawsuit under the FDCPA; and (2) a court determined that plaintiffs' suit was "frivolous." In other words, Fischer was able to collect attorney fees, but only after a specific series of events had transpired. A "least sophisticated debtor," however, would interpret Fischer's statement as implying that attorney fees were a very real and immediate consequence for any refusal or delay in paying the debt.

Id. at 1106.

In the instant case, Defendant did not "technically" seek to collect attorney fees from Plaintiff. Nevertheless, the "least sophisticated consumer," reading Vick's affidavit in conjunction with the complaint, might reasonably believe that "attorney fees were a very real and immediate consequence for any refusal or delay in paying the debt," even though they were not recoverable under Ohio law. In that respect, Defendant did engage in deceptive means to attempt to collect the debt.

In *McDowall v. Leschack & Grodensky, PC,* 279 F.Supp.2d 197 (S.D.N.Y.2003), a debt collector sent a letter to the debtor stating that the balance due on a credit card account was "$2,942.27 plus interest and attorney's fees." An asterisk following this statement indicted that "pursuant to your credit card agreement, you agreed, to the extent permitted by law, to pay all reasonable attorney's fees." The court found that the debt collector had violated the FDCPA because the notice of claim did not make it clear that the debtor owed no attorney fees at that time. *Id.* at 200. The court concluded, "[i]n all, defendants' letter could confuse the least sophisticated consumer by not stating a sum certain that is owed as of a particular date. Even worse, it could unlawfully scare the consumer by making her believe she owes a sum well beyond what is actually owed." *Id.*

While the instant case is obviously factually distinguishable, the end result is the same. It is undisputed that Direct Merchants was not entitled to recover attorney fees under Ohio law, and did not include a claim for attorney fees in its prayer for relief. Defendant nevertheless attached Vick's

affidavit, referring to a potential for the collection of attorney fees, to the complaint. The Court concludes, as a matter of law, that the "least sophisticated consumer" would be confused by this. Defendant's conduct could "unlawfully scare" the consumer by making her believe that, if she did not immediately pay her credit card bill, she could be held liable for substantial attorney fees in addition to the relief sought in the complaint.

For these reasons, the Court concludes that Plaintiff is entitled to summary judgment as a matter of law on the issue of liability with respect to the alleged violations of 15 U.S.C. § 1692e(5) and 15 U.S.C. § 1692e(10). The Court accordingly denies Defendant's motion for summary judgment with respect to these claims.

2. OCSPA

Plaintiff's complaint also alleges that Defendant's conduct constitutes an unfair and deceptive consumer sales practice in violation of the OCSPA. Both parties have moved for summary judgment on this claim. The OCSPA states that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." Ohio Revised Code § 1345.02(A). A "supplier" is defined as "a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer." Ohio Revised Code § 1345.01(C). A "consumer transaction" is defined as "a sale, lease, assignment, award by chance, or other transfer of

an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." Ohio Revised Code § 1345.01(A). The definition of a "consumer transaction," however, specifically excludes transactions between financial institutions, as defined in Ohio Revised Code § 5725.01, and their customers. *Id.*

Plaintiff concedes that Direct Merchants is a financial institution, but argues that Defendant can nevertheless be held liable under the OCSPA as a "supplier." The Court disagrees. It is true that debt collectors may, in some instances, be liable as "suppliers" for violations of the OCSPA. However, unless the collection action is associated with an underlying "consumer transaction," there can be no violation of the OCSPA. *See Lamb v. Javitch, Block & Rathbone, LLP,* No. 1:04-cv-520 (S.D.Ohio Jan. 24, 2005)(attached to Def.'s Notice of Supp. Auth.). Here, because the underlying contract between Plaintiff and Direct Merchants falls outside the scope of a "consumer transaction," Defendant's collection efforts in connection with that debt fall outside the purview of the OCSPA. Defendant is therefore entitled to summary judgment as a matter of law on Plaintiff's OCSPA claim.[FN5]

FN5. Because the Court has granted summary judgment on this basis, it need not address Defendant's alternative argument that attorneys are immune from suit under the OCSPA.

IV. Plaintiff's Motion for an Extension of Time to File a Motion for Class Certification

Plaintiff's unopposed motion for an extension of time to file a motion for class certification is granted.

V. Conclusion

For the reasons set forth above, Defendant's motion for summary judgment (Record at 4), and Plaintiff's motion for partial summary judgment on the issue of liability (Record at 29) are **GRANTED IN PART and DENIED IN PART**. Defendant is entitled to summary judgment on Plaintiff's OCSPA claim, and on Plaintiff's FDCPA claims alleging violations of 15 U.S.C. § § 1692e(2)(A), 1692e(2)(B), 1692d and 1692f(1). However, Plaintiff is entitled to summary judgment on the issue of liability with respect to the FDCPA claims alleging violations of 15 U.S.C. § § 1692e(5) and 1692e(10).

Plaintiff's motion for an extension of time within which to file a motion for class certification (Record at 18) is **GRANTED**. Plaintiff shall file that motion within sixty (60) days of the date of this Memorandum Opinion and Order.

IT IS SO ORDERED.

Date: November 30, 2005

/s/ John D. Holschuh
John D. Holschuh, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Sherry GIONIS, Plaintiff,

v.

JAVITCH, BLOCK & RATHBONE, Defendant.

No. 2:04 CV 1119

MEMORANDUM OPINION & ORDER

On November 30, 2005, this Court issued an Order granting in part and denying in part cross-motions for summary judgment. This matter is currently before the Court on Defendant's motion for certification of an interlocutory appeal (Record at 35), Defendant's motion to stay further proceedings pending the outcome of the appeal (Record at 36), and Defendant's motion for reconsideration and motion to strike class allegations (Record at 41). For the reasons set forth below, the Court denies the motion for reconsideration and motion to strike the class allegations, but certifies the question for interlocutory appeal and stays all further proceedings pending the outcome of that appeal.

I. Procedural History

Plaintiff filed suit, on behalf of herself and others similarly situated, alleging that Defendant violated the Fair Debt Collection Practices Act ("FDCPA")

and the Ohio Consumer Sales Practices Act ("OCSPA") when it filed suit against her in state court, seeking to collect money she owed to Direct Merchants Credit Card Bank. Ohio law does not permit the collection of attorney fees in connection with claims involving consumer debt. Although the complaint filed in state court did not include a claim for attorney fees in its prayer for relief, Defendant attached to that complaint an affidavit, executed by an agent of Direct Merchants, stating that, pursuant to the terms of the cardholder agreement, Direct Merchants was "entitled to recover, to the extent permitted by applicable law, its reasonable attorney's fees and costs incurred in any action to enforce its rights under the agreement." Plaintiff contends that by attaching that affidavit, asserting a possible entitlement to attorney fees, to the complaint, Defendant engaged in deceptive debt collection practices in violation of federal and state law.

In its November 30, 2005 Memorandum Opinion and Order, the Court granted in part and denied in part cross-motions for summary judgment. The Court granted summary judgment in favor of Defendant with respect to the OCSPA claim. With respect to the alleged violations of the FDCPA, the Court held that Defendant was entitled to summary judgment in connection with the alleged violations of 15 U.S.C. § § 1692e(2)(A) and (B), 1692d and 1692f(1). However, the Court held that Plaintiff was entitled to summary judgment in connection with the alleged violations of 15 U.S.C. § § 1692e(5) and 1692e(10), and that Defendant was not immune from liability on any of the theories alleged, *i.e.*, litigation privilege, First Amendment,

and the doctrine of witness immunity. The Court gave Plaintiff sixty days to file her motion for class certification.

Pursuant to the collateral order exception to the final judgment rule, Defendant filed an appeal, as of right, from the Court's denial of its claim of immunity. Pursuant to 28 U.S.C. § 1292(b), Defendant urges the Court to certify for interlocutory appeal the additional issue of whether Defendant's conduct violated 15 U.S.C. § § 1692e(5) and 1692e(10). Defendant contends that considerable time and expense could be saved by allowing the Sixth Circuit to review the issues of immunity and liability at the same time. Defendant seeks a stay of these proceedings pending the outcome of that appeal.

On December 8, 2005, Defendant also moved for reconsideration of that portion of the Court's November 30, 2005 Memorandum and Order that granted Plaintiff's motion for an extension of time to file her motion for class certification, and gave Plaintiff 60 days from the date of the Order to do so. Defendant urges the Court to strike the class allegations from the complaint.

II. Motion for Reconsideration/Motion to Strike Class Allegations

Motions for class certification must be filed within 120 days of the filing of the complaint. *See* S.D. Ohio Civ. R. 23.3. The complaint in this case was filed on November 23, 2004. On March 11, 2005, before the 120-day period expired, Plaintiff moved

the Court for an extension of time to file her motion for class certification, through June 21, 2005. She noted that she had not yet conducted any discovery on the class certification issue because Defendant had objected to Magistrate Judge Kemp's February 11, 2005 order granting Plaintiff time to conduct limited discovery before responding to Defendant's pending motion to dismiss or, in the alternative, motion for summary judgment. On March 22, 2005, the parties entered into an agreed order staying all discovery pending resolution of the objections.

On August 11, 2005, the Court overruled Defendant's objections to Magistrate Judge Kemp's order and lifted the stay. The Court gave Plaintiff until September 30, 2005 to complete limited discovery and file a response to the pending motion for summary judgment. After that motion was fully briefed, Plaintiff filed a motion for summary judgment on the issue of liability. On November 30, 2005, the Court granted in part and denied in part both motions for summary judgment. The Court also granted Plaintiff's motion for an extension of time to file her motion for class certification was still pending, and gave Plaintiff 60 days to file her motion.

On December 8, 2005, Defendant filed a motion for reconsideration and motion to strike the class allegations in Plaintiff's complaint. Motions for reconsideration are granted only in four limited circumstances: (1) to accommodate an intervening change in controlling law; (2) to account for newly discovered evidence; (3) to correct a clear error of law; or (4) to prevent manifest injustice. *See*

GenCorp, Inc. v. American Int'l Underwriters, 178 F.3d 804, 834 (6th Cir.1999). Defendant contends that reconsideration of the November 30, 2005 Memorandum Opinion and Order is necessary to account for newly discovered evidence, to correct a clear error of law, and to prevent manifest injustice.

Defendant notes that Plaintiff requested an extension of time only through June 21, 2005 to file her motion for class certification, and did not request any additional extensions. Defendant claims that Plaintiff waived her right to seek any additional extensions, and implies that the Court therefore erred in granting Plaintiff's request. The Court does not agree. When Plaintiff filed her motion for an extension of time on March 11, 2005, this tolled the deadline. Unfortunately, the Court did not rule on Plaintiff's motion until November 30, 2005, well beyond the original extension requested. In any event, Plaintiff cannot be faulted for failing to request additional extensions of time while her original motion was still pending.

Defendant also claims that reconsideration is necessary to prevent manifest injustice, and is appropriate based on newly discovered evidence. Defendant attached to its motion an e-mail from Plaintiff's counsel dated December 7, 2005, sent in response to a request to schedule Plaintiff's deposition. In that e-mail, Plaintiff's counsel disclosed for the first time that Plaintiff is currently undergoing hospice care for a terminal illness, making it very difficult for her to be disposed. (Ex. 1 to Mot. to Strike). Defendant subsequently offered to settle Plaintiff's individual

claim and dismiss its appeal if Plaintiff agreed to abandon her class claims, but Plaintiff's counsel rejected that offer. (Ex. 2 to Mot. to Strike). According to Defendant, under the circumstances presented here, Plaintiff is not an adequate representative of the proposed class, and it would be inconsistent with her interests to maintain the litigation as a class action. Based on these recent developments, Defendant urges the Court to reconsider its November 30, 2005 Order and strike the class allegations from Plaintiff's complaint.

Defendant's arguments are premature. Whether Plaintiff can adequately represent the interests of the putative class members is not currently at issue. This question can be addressed in connection with Plaintiff's motion for class certification once it is filed. Plaintiff's potential inability to act as lead plaintiff for the putative class is not, at this stage of the litigation, grounds for reconsidering the Court's previous Order, or for striking the class allegations from the complaint. Defendant's motion for reconsideration, and its motion to strike the class allegations from Plaintiff's complaint, are therefore denied.

III. Motion to Certify Interlocutory Appeal, and Motion to Stay

Defendant has already filed a Notice of Appeal, pursuant to the collateral order doctrine, with respect to that portion of the Court's November 30, 2005 Memorandum Opinion and Order that denied Defendant's motion to dismiss on grounds of immunity. Defendant now seeks to expand the

scope of that appeal so that the Sixth Circuit can review not only the immunity issue, but also the question of whether this Court erred in holding that Defendant violated portions of the FDCPA by attaching the affidavit, referring to a possible entitlement to attorney fees, to the complaint. The Sixth Circuit will not consider the FDCPA liability issue unless this Court first certifies it for interlocutory appeal.

The procedures governing interlocutory appeals are set forth in 28 U.S.C. § 1292(b). That statute provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order *involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation,* he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (emphasis added).

Interlocutory appeals are "granted sparingly and only in exceptional cases." *In re City of Memphis,* 293 F.3d 345, 350 (6th Cir.2002).

Nevertheless, if the statutory requirements for an interlocutory appeal have been met, appellate courts have often agreed to expand the scope of appellate review, deciding issues in addition to those immediately appealable under the collateral order doctrine. *See*16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3929.1 (2d ed.1996)(noting that § 1292(b) is sometimes used to "expand the potential scope of an appeal taken on a collateral-order or similar theory"). *See also Palmer v. Sanderson,* 9 F.3d 1433, 1434 (9th Cir.1993); *In re City of Philadelphia Litigation,* 49 F.3d 945, 956 (3d Cir.1995).

The Court finds that certification of the interlocutory appeal is appropriate in this case. The relevant facts are undisputed. The question at issue-whether Defendant's conduct violated 15 U.S.C. § § 1692e(5) and 1692e(10)-involves a question of law. The Sixth Circuit has held that "[a] legal issue is controlling if it could materially affect the outcome of the case." *In re City of Memphis,* 293 F.3d at 351. Here, if the Sixth Circuit found that Defendant's conduct did not constitute a violation of the FDCPA, the outcome of the case is clearly affected. The question at issue also involves a question as to which there is a substantial ground for difference of opinion. Courts have interpreted this requirement to include those questions which are novel, or involve matters of first impression, and those questions as

to which there is conflicting authority. *See Eagan v. CSX Transp., Inc.*, 294 F.Supp.2d 911, 916 (E.D.Mich.2003). As the Court noted in its November 30, 2005 Order, there is little, if any, case law governing this particular set of facts. Because it appears to be a matter of first impression, there is a substantial ground for a difference of opinion.[FN1]

> FN1. Plaintiff notes that Judge Beckwith, in *Kelly v. Great Seneca Financial Corp.*, Case No. 1:04-cv-615, 2005 WL 2372851 (S.D.Ohio 2005), denied a motion to certify an interlocutory appeal in an FDCPA case. That case, however, is distinguishable. The issue was whether the FDCPA applies to lawyers in litigation. As Judge Beckwith noted, the Supreme Court, in *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995), already decided that it does. Therefore, there was no "substantial ground for difference of opinion."
> Plaintiff also cites to *Todd v. Weltman, Weinberg & Reis Co.*, 348 F.Supp.2d 903 (S.D.Ohio2004), in which Judge Dlott summarily denied Defendant's motion for certification of an interlocutory appeal. However, the issues in that case are also factually distinguishable.

The Court also finds that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. This Court has already determined that Defendant is liable for violations of two provisions of the FDCPA. With

liability already established, the next step in the district court litigation is to determine whether class certification is warranted. As Defendant notes, the costs associated with related discovery and class notification and administration are substantial. Before the parties and the Court invest time and resources to the class certification issue, it makes sense, at this juncture, for the Sixth Circuit to have the opportunity to decide whether Defendant did, in fact, violate the FDCPA.

In a separate motion, Defendant urges the Court to stay all proceedings pending the outcome of the appeal. For the same reasons set forth above, the Court grants Defendant's motion to stay, and vacates the deadline for Plaintiff to file her motion for class certification.

IV. Conclusion

The Court **DENIES** Defendant's motion for reconsideration and motion to strike class allegations (Record at 41). However, the Court **GRANTS** Defendant's motion for certification of an interlocutory appeal (Record at 35), and Defendant's motion to stay further proceedings pending the outcome of the appeal (Record at 36).

IT IS SO ORDERED.

Date: December 14, 2005

/s/ John D. Holschuh
John D. Holschuh, Judge
United States District Court

Case No. 06-3048/06-3171

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHERRY GIONIS,
Plaintiff-Appellee,

v.

JAVITCH, BLOCK & RATHBONE,
Defendants-Appellants.

ORDER

(issued November 19, 2007)

Upon consideration of appellant's motion to stay the mandate with suggestion of death of appellee and requesting the court to withdraw its opinion with responses and replies in opposition,

It is ORDERED that the above motions be and hereby are DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green___
Leonard Green, Clerk

Nos. 05-0307 & 06-3048

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

05-0307
In re Javitch, Block & Rathbone
Petitioner (05-0307)

06-3048
Sherry Gionis,

Plaintiff-Appellee,

v.

Javitch, Block & Rathbone,

Defendant-Appellant.

Before: COLE, CLAY and GIBBONS, Circuit Judges.

(Order Filed February 7, 2006)

The plaintiff brought this class action under the Fair Debt Collection Practices Act ("FDCPA") against the defendant law firm of Javitch, Block & Rathbone ("Javitch"). Therein, she challenged Javitch's action in filing a complaint in state court for the collection of a debt. In a memorandum opinion and order, the district court granted summary judgment to the defendants on several counts, granted the plaintiff summary judgment on

liability in one count, and denied the defendant's claim of immunity.

The defendant appealed the denial of immunity as a collateral order. The plaintiff moves to dismiss that appeal. The defendant also asked the district court to certify its order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court did so, and the defendant now petitions this court for permission to take an interlocutory appeal from the grant of partial summary judgment to the plaintiff.

This court has allowed an interlocutory appeal from the denial of absolute and witness immunity in a similar case. In *Todd* v. *Weltman, Weinberg & Reis Co., LPA,* - F.3d -, No. 04- 4109,2006 WL 73342 (6th Cir. Jan. 13,2006). Accordingly, the motion to dismiss shall be denied.

The defendant seeks permission to appeal the remaining portion of the district court's opinion that concludes it violated the FDCPA by attaching to the complaint an affidavit referring to attorneys' fees. This court may grant a petition for permission to take an interlocutory appeal if the district court has certified that: (1) the question involved is one of law; (2) the question is controlling; (3) there is substantial ground for difference of opinion respecting the correctness of the district court's decision; and (4) an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). *See In re City ofMemphis,* 293 F.3d 345,350 (6th Cir. 2002); *Cardwell* v. *Chesapeake & Ohio Ry. Co.,* 504 F.2d 444,446 (6th Cir. 1974). The district court has so

certified, and upon review, it appears that an interlocutory appeal is appropriate.

Therefore, it is **ORDERED** that the motion to dismiss the appeal be denied. The petition for permission to appeal is granted. The two appeals shall be consolidated.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green___
Leonard Green, Clerk

Nos. 06-3048/3171

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHERRY GIONIS,
Plaintiff-Appellee,

v.

JAVITCH, BLOCK & RATHBONE,
Defendants-Appellants.

ORDER

(Filed October 19, 2007)

BEFORE: KEITH, and COLE, Circuit Judges; and STEEH, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Steeh would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green___
Leonard Green, Clerk

* Hon. George C. Stech, United States District Judge for the Eastern District of Michigan, sitting by designation.